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# Part IX

# Department of Energy

## Economic Regulatory Administration

## Mandatory Petroleum Price Regulations; Equal Application Rule

**DEPARTMENT OF ENERGY**

**Economic Regulatory Administration**

**10 CFR Part 212**

**[Docket No. ERA-R-80-*20*]**

## Mandatory Petroleum Price Regulations; Equal Application Rule

**AGENCY:** Economic Regulatory Administration, Department of Energy.

**ACTION:** Notice of Proposed Rulemaking and Public Hearing.

**SUMMARY:** The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) hereby gives notice of a proposed rulemaking and public hearing regarding the equal application rule. Specifically, DOE proposes to eliminate the equal application rule with respect to retail sales of gasoline. In the alternative, DOE proposes to eliminate the equal application rule with respect to (1) all sales of gasoline, (2) retail sales of gasoline provided more increased costs are passed through in retail prices than in the weighted average price increase of other sales, or (3) all sales of gasoline provided more increased costs are passed through in retail prices than in the weighted average price increase of other sales.

**DATES:** Comments due 4:30 p.m. 60 days from the date this notice appears in the **Federal Register.** Requests to speak at San Francisco hearing by July 18, 1980, 4:30 p.m. Requests to speak at Washington, D.C. hearing by July 10, 1980, 4:30 p.m. Hearing Date: San Francisco hearing, July 22, 1980, 9:30 a.m.; Washington, D.C. hearing, July 15, 1980, 9:30 a.m.

**ADDRESSES:** All comments to Public Hearing Management, Docket No. ERA-R-80-*20*, Department of Energy, Room 2313, 2000 "M" Street, N.W., Washington, D.C. 20461. Requests to speak at San Francisco hearing to Department of Energy, Attn: Terry Osborn, 333 Market St., San Francisco, California, 94111, (415) 556-4953. Requests to speak at Washington, D.C. hearing to Office of Public Hearing Managment, Room 2313, 2000 "M" Street, N.W., Washington, D.C. 20461, (202) 653-3757.

**HEARING LOCATIONS:** San Francisco hearing: Golden Gate Gateway Holiday Inn, Oregon-Nevada Room, 1500 Van Ness Ave., San Francisco, California; Washington hearing: 2000 "M" Street, N.W., Room 2105, Washington, D.C. 20461.

**FOR FURTHER INFORMATION CONTACT:**

Robert C. Gillette (Hearing Procedures), Economic Regulatory Administration, Room 2222-A, 2000 M Street, N.W., Washington, D.C. 20461, (202) 653-3757

William L. Webb (Office of Public Information), Economic Regulatory Administration, Room 110-B, 2000 M Street, N.W., Washington, D.C. 20461, (202) 653-4055

Chuck Boehl (Regulations and Emergency Planning), Economic Regulatory Administration, Room 7302, 2000 M Street, N.W., Washington, D.C. 20461, (202) 653-3202

William Funk or William Mayo Lee (Office of General Counsel), Department of Energy, Room 6A-127, 1000 Independence Avenue, S.W., Washington, D.C. 20585, (202) 252-6736 or 252-6754.

**SUPPLEMENTARY INFORMATION:**

I. Background
II. Proposed Rule
III. Alternative Proposals
IV. Written Comments and Public Hearing Procedures
V. Procedural Requirements

### *I. Background*

On July 16, 1979 (44 FR 42541, July 19, 1979), DOE issued final rules concerning the price rule for sales of motor gasoline by independent retailers. The rules adopted a different and much simplified method for retailers to calculate the maximum lawful selling price of each type or grade of gasoline. The DOE adopted similar rules for resellers and reseller-retailers effective May 1, 1980. In effect, the new price rules state that the maximum lawful selling price for each type or grade of gasoline is the acquisition cost, plus a fixed cents per gallon markup,[1] plus applicable taxes. The equal application rule with respect to independent retailers' sales and most resellers' and reseller-retailers' sales of gasoline was no longer operative and therefore was deleted.

On September 17, 1979 DOE issued a Notice of Proposed Rulemaking (44 FR 54902, September 21, 1979), concerning the equal application rule as it applied to retail sales. DOE believed the regulations, in some instances, provided a regulatory incentive for certain refiners and reseller-retailers to maintain their selling prices in retail sales of gasoline substantially below those of independent retailers.[2] This created competitive imbalances in the market place which possibly could have had serious long-term effects on the independent portion of the industry. Accordingly, on June 15, 1980, DOE issued a final rule which increased the 3 cents per gallon limitation on the difference refiners may charge between retail sales and other types of sales, without being subject to the equal application rule, to 9.3 cents per gallon. In addition, the reseller-retailer equal application rule was amended to permit reseller-retailers up to a 9.3 cents per gallon difference between increased costs which may be passed through at retail and other levels of distribution without being subject to the equal application rule.[3]

Generally, the amendments to the equal application rule allow refiners and reseller-retailers a margin increase in retail prices without permitting them an increase in their overall allowable margins. Any increases in retail prices result in compensating reductions in the prices charged in other sales or in a drawdown of "banked" costs.

Many of the comments received during the rulemaking process specifically suggested that DOE's solution would not meaningfully address the problem of price disparities at the retail level, but that the elimination of the equal application rule in its entirety with respect to all gasoline sales, or at least at the retail level, would avoid possible regulatory-induced undercutting by refiners of their independent competitors.[4] The commenters stated that the proposed changes to the equal application rule would not eliminate the requirement that the equal application rule apply *within* a class of purchaser as well as *between* classes of purchaser. In other words, firms would be deemed to recoup any increase in one retail sale on all other retail sales. Since in many instances competitive market conditions would not allow refiners to raise all their retail gasoline prices, they stated that as a practical matter in most cases they would be unable to raise any of their retail prices.

In response to those comments, DOE is issuing this Notice of Proposed Rulemaking concerning the equal

[1] Independent retailers were permitted a 16.1 fixed cents per gallon markup. Effective June 15, 1980, the 16.1 fixed cents per gallon markup limitation was increased to 16.8 cents to reflect the GNP deflator. Resellers and reseller-retailers were permitted a 7.7 fixed cents per gallon markup in resales of gasoline. Beginning June 15, 1980, this figure was increased to 8.4 cents per gallon to reflect the GNP deflator.

[2] With the adoption of the new reseller and reseller-retailer price rules, the same problem could develop at the wholesale level with respect to refiners' resales and at the retail level with respect to reseller-retailers' retail sales.

[3] Beginning May 1, 1980 the equal application rule for resellers and reseller-retailers will only apply to firms which elect to establish maximum lawful selling prices pursuant to § 212.93(a)(5). Effective June 15, 1980, the 8.6 cents was increased to 9.3 cents to reflect increases in the GNP deflator.

[4] With the adoption of new reseller and reseller-retailer price rules, the problem of price disparities may develop at the wholesale level of distribution.

application rule. Specifically DOE proposes the elimination of the equal application rule in retail sales of gasoline, or, in the alternative, elimination of the equal application rule altogether with respect to sales of gasoline. Finally, DOE is also proposing alternatives which would eliminate the equal application rule either in retail sales or in all sales of gasoline only when the increased costs passed through at retail are greater than those passed through in wholesale sales.

In proposing the partial or total elimination of the equal application rule, DOE does not intend to suggest that the equal application rule was misconceived or a mistake and that it did not serve the purposes of the Emergency Petroleum Allocation Act of 1973 (EPAA). To the contrary, DOE believes the equal application rule has played an important role in the equitable pricing of petroleum products.

The present price control system for refiners generally established as a base price, the prices paid by each class of purchaser in transactions on March 15, 1973. The base price for each class of purchaser was frozen as of that date, a time when the petroleum markets were relatively normal. In order to protect the various classes of purchasers in a price control system expected to be of short duration, increased costs were to be allocated equally to each class of purchaser and within each class of purchaser. The equal application rule plays an integral role in the method and theory of the present price control system for refiners, which is essentially to maintain the historical differentials in prices between and among classes of purchasers in order to ensure that petroleum products are distributed at equitable prices. Partial, and especially total, elimination of the equal application rule would therefore substantially alter the method and theory of the price control system by eliminating the strong incentive to maintain historical differentials. If such changes were adopted, both the class of purchaser concept and so-called transaction rule would in the future have little impact.

Three factors lead DOE to propose the partial or total elimination at this time. First, Executive Order 12044 requires all departments to review existing regulations. The equal application rule has been a regulation subjected to much discussion and some criticism and, therefore, it is appropriate for DOE to review it in light of current needs and requirements. This is especially so because, while maintaining historical differentials ensures equitable prices for a certain period of time, at some point a change in society, the economy, and the petroleum market could make the historical differentials inequitable and anomalous. Second the changes in the resellers', reseller-retailers', and retailers' price rules, which in most instances eliminated the May 15, 1973, base price plus allowable cost increases as the basis for establishing maximum lawful selling prices, as well as the equal application rule in these market sales, may make the retention of the equal application rule for refiners and certain resellers an anomaly, particularly when applied at the retail level. Third, the equal application rule tends to discourage the imposition of significant price differentials among similarly situated customers and therefore may reduce the pricing flexibility of those subject to it. In a regime of full scale and pervasive controls, such a reduction in pricing flexibility may be justified, because the conditions that make pervasive controls necessary suggest that free market competition is inadequate to allocate products equitably at equitable prices. The Administration and DOE, however, have indicated their intention to decontrol gasoline as soon as market conditions allow. The EPAA, the statutory basis for controls, expires in September 1981. With respect to crude oil, DOE has undertaken a number of regulatory actions designed to "phase in" decontrol so that ultimate decontrol will not be unnecessarily disruptive. Accordingly, it may be advisable to take certain actions with respect to the gasoline price regulations which would similarly "phase in" its decontrol. Among such possible actions would be modifications to or elimination of the equal application rule to introduce a greater degree of pricing flexibility and market competition.

As noted above, total elimination of the equal application rule would substantially alter the present price control system for refiners. While the amount of increased costs that could be added to prices would not be affected, the regulations effectively would no longer assign those costs among and between classes of purchasers. Rather the market would assign these costs.

In proposing the partial or total elimination of the equal application rule, ERA is not ignoring the EPAA mandate to ensure equitable pricing to the maximum extent practical. Instead, this proposal reflects ERA's tentative conclusion that at this time and given the current and projected petroleum stocks, and decreased demand, allocation of increased costs by market forces will result in equitable pricing, while at the same time furthering the EPAA objective of minimizing unnecessary interference with market mechanisms.

*II. Proposed Rule*

The proposed rule would amend the equal application rule, with respect to refiners and those reseller-retailers electing to establish maximum lawful selling prices pursuant to § 212.93(a)(5), by excepting retail sales of gasoline from the equal application rule.

The effect of such a rule would be to allow refiners and reseller-retailers to pass through greater increased costs at retail generally than at other levels, or pass through greater increased costs in some retail markets than in others, without having the differences deemed to have been recouped pursuant to the provisions of the equal application rule.

The proposed rule would not increase the potential revenues of refiners and reseller-retailers because it would not increase the total amount of allowable increased costs that could be passed through. Rather, the proposed rule would permit refiners and reseller-retailers to allocate their increased costs in a different and more flexible manner because they would not be required by the regulations to sell gasoline at prices below their independent competition. For example, if a firm does not have any "banks" of unrecouped increased costs and generally passes through greater increased costs in retail sales, it will have to diminish the increased costs passed through at other levels of distribution. In addition, if a firm passes through greater increased costs in some retailed markets, it may decrease the pass through of increased costs in other retail markets rather than diminishing the pass through at other levels of distribution.

On the other hand, if a firm has "banks" of unrecouped increased costs, it may draw down those "banks" by passing through greater increased costs in retail sales generally or in particular retail markets while not diminishing the increased costs passed through at other levels. In other words, the firm could increase its actual revenues in the short-run to the extent that market competition or other government programs, such as the Council on Wage and Price Stability (COWPS), allow (see Draft Regulatory Analysis).

Elimination of the equal application rule at the retail level, however, would remove the incentive for refiners and reseller-retailers to pass through equal amount of increased costs at each level of distribution and in each retail sale. To the extent that this flexibility could

result in undercutting by refiners and reseller-retailers of prices charged by independents, it would be inconsistent with the purpose of the proposed amendment. Nevertheless, the existing requlations may encourage refiners and reseller-retailers to sell gasoline at prices below those charged by independent retailers. Under the proposed amendment, there would be no regulatory-induced incentive for refiners or reseller-retailers to undercut their independent competition. Should firms take advantage of termination of the rule to initiate predatory pricing, which could harm the independent segment of the industry in the long-term, there are anti-trust laws that may apply in certain situations or perhaps other legislation may be appropriate. And, as discussed above, allowing the pricing flexibility provided in the proposal is a form of phasing out controls which will expire in September 1981. On balance, DOE believes that at the present time the procompetitive aspects of eliminating the equal application rule at the retail level outweigh any possible anti-competitive potential, and thus the proposal would further the purposes of the EPAA. Nevertheless, DOE is proposing in two of the alternatives in this notice a possible safeguard against price undercutting that DOE may adopt if comments convince us that the anti-competitive potential is greater than anticipated.

*III. Alternative Proposals*

In the alternative, DOE proposes to 1) eliminate the equal application rule with respect to all sales by refiners, resellers, and reseller-retailers, 2) eliminate the equal application rule in retail sales provided that increased costs passed through at retail are not less than at other levels of distribution, or 3) eliminate the rule for all sales of gasoline except for the retail sales in which increased costs passed through are less than at other levels of distribution. DOE reserves the authority to adopt any of the proposals, or modifications thereof, depending on the comments received.

The elimination of the equal application rule in its entirety would permit firms to allocate increased costs at the various levels of distribution without regard to historic differentials between or within classes of purchaser. In other words, firms would be free to alter the price differentials between or within classes of purchaser without being deemed to have recouped with respect to all customers the highest increased cost passed through to any customer. That is, firms could pass through much greater increased costs in some marketing areas if competition would allow it.[5] On the other hand, where supplies are generally adequate, a firm could subsidize prices in other marketing areas in order to increase its market share. Both could be problems, but, as described above, at this time and after several years experience under the equal application rule, DOE believes it is appropriate to reassess the potential for these problems and the costs of the equal application rule in terms of pricing inflexibility and its anti-competitive effects. In this respect, DOE especially seeks the views of the Department of Justice, the Federal Trade Commission, and the Council on Wage and Price Stability.

A second alternative is to eliminate the equal application rule at the retail level, but only to the extent that increased costs passed through at retail are not less than at other levels. This would exempt from the equal application rule only those actual retail sales in which greater increased costs were passed through than were passed through in the same marketing area at other marketing levels. Under this alternative, refiners and reseller-retailers would continue to be deemed to have recouped increased costs if they reduce the pass through of increased costs in retail prices relative to other prices.

For example, if a refiner with two retail outlets in the same marketing area passes through one cent and six cents respectively, while passing through a weighted average 4 cents at wholesale, then the equal application rule would not apply with respect to sales at the station with a 6 cents pass through but would apply at the station with the 1 cent pass through. At the latter station the firm would be deemed to have recouped an additional 3 cents with respect to all volumes sold at that outlet.

A third alternative would be to eliminate the equal application rule for all sales except at retail when increased costs passed through at retail are less than the weighted average amount of increased costs passed through at other levels. As in the case of the second alternative, this could protect independent marketers by providing a disincentive for refiners and reseller-retailers from passing through less costs at retail than at other levels of distribution, but would also promote competition at other levels of distribution.

[5] At retail this could not occur because refiner and reseller-retailers are limited in the amount of increased costs which may be passed through in retail sales. *See* § 212.83(c)(l)(i)(C) and § 212.93(b)(v). However, it could occur at other marketing levels.

Under each alternative the 9.3 cents differential permitted between retail sales and other sales in the current rules would be eliminated. Also, the 3 cents differential currently permitted between PADD's would no longer apply.

*IV. Written Comment and Public Hearing Procedures*

A. *Written Comments.* You are invited to participate in this notice or rulemaking by submitting data, views or arguments with respect to the issues set forth in this Notice. Comments should be identified on the outside envelope and on documents submitted with the designation "Equal Application Rule" Docket No. ERA-R-80-*20.* Ten copies should be submitted. All comments received will be available for public inspection in the DOE Freedom of Information Office, Room GA-145, James Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C., between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday. Comments regarding the proposed amendments should be received on or before August 29, 1980.

B. *Public Hearing.* 1. *Procedure for Requesting Participation.* The times and places for the hearings are indicated in the "Dates" and "Addresses" section of this Notice. If necessary to present all testimony, hearings will be continued at 9:30 a.m., on the next business day following the first day of the hearing.

You may make a written request for an opportunity to make an oral presentation at the hearings. The requests should contain a phone number where you may be contacted through the day before the hearing.

We will notify each person selected to be heard at the Washington, D.C hearing before 4:30 p.m., July 7, 1980, and at the San Francisco hearing before 4:30 p.m, July 18, 1980. Persons scheduled to speak at the hearings are requested to bring 100 copies of their statement to San Francisco on the date of the hearing and to Room 300A, Federal Building, 12th and Pennsylvania Avenue, N.W., Washington, D.C. 20461, by 4:30 p.m., July 14, 1980, for the Washington hearing.

2. *Conduct of the Hearing.* We reserve the right to select the persons to be heard at the hearing, to schedule their respective presentations, and to establish the procedures governing the conduct of the hearing. The length of each presentation may be limited, based on the number of persons requesting to be heard.

A DOE official will be designated to preside at the hearings, which will not be judicial in nature. Questions may be asked only by those conducting the

hearing. At the conclusion of all initial oral statements, each person who has made an oral statement will be given the opportunity to make a rebuttal statement. The rebuttal statements will be given in the order in which the initial statements were made and will be subject to time limitations.

You may submit questions to be asked by the presiding officer of any person making a statement at the hearings. Such questions should be submitted to the address indicated above for requests to speak, for the location concerned, before 4:30 p.m. on the day prior to the hearing. If at the hearing you decide that you would like to ask a question of a witness, you may submit the question, in writing, to the presiding officer. In either case the presiding officer will determine whether the question is appropriate and if the time limitations permit it to be presented for a response.

Any further procedural rules needed for the proper conduct of a hearing will be announced by the presiding officer.

Transcripts of the hearings will be made, and the entire record of the hearings, including the transcripts, will be retained by the DOE and made available for inspection at the Freedom of Information Office, Room GA-145, James Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C., between the hours of 8 a.m. and 4:30 p.m., Monday through Friday. Any person may purchase a copy of the transcript from the reporter.

In the event that it becomes necessary for us to cancel a hearing, we will make every effort to publish advance notice in the **Federal Register** of such cancellation. Moreover, we will give actual notice to all persons scheduled to testify at the hearings. However, it is not possible to give actual notice of cancellations or changes to persons not identified to us as participants. Accordingly, persons desiring to attend a hearing are advised to contact DOE on the last working day preceding the date of the hearing to confirm that it will be held as scheduled.

*V. Procedural Requirements*

A. *Section 7 of the FEA Act*

Under section 7(a) of the Federal Energy Administration Act of 1974 (15 U.S.C. § 787 *et seq.*, Pub. L. 93275, as amended), the requirements of which remain in effect under section 501(a) of the DOE Act, the delegate of the Secretary of Energy shall, before promulgating proposed rules, regulations, or policies affecting the quality of the environment, provide a period of not less than five working days during which the Administrator of the Environmental Protection Agency (EPA) may provide written comments concerning the impact of such rules, regulations, or policies on the quality of the environment. Such comments shall be published together with publication of notice of the prosposed action. The Administrator commented that he does not foresee these actions having an unfavorable impact on the quality of the environment as related to the duties and responsibilities of the EPA.

B. *Section 404 of the DOE Act*

Pursuant to the requirements of section 404(a) of the Department of Energy Organization Act ("DOE Act" Pub. L. 95-91), this proposed rule has been referred, concurrently with the issuance hereof, to the Federal Energy Regulatory Commission for a determination as to whether the proposed rule might significantly affect any function within the Commission's jurisdiction under section 402(c) of the DOE Act. The Commission will have until the scheduled close of the public comment period on the proposal, to make such determination.

C. *Regulatory Analysis*

A regulatory analysis as required for proposed rulemakings pursuant to Executive Order 12044, entitled "Improving Government Regulations" (43 FR 12661, March 24, 1978) and DOE's implementing procedures, has been prepared by ERA. A summary of the proposed regulatory analysis is set forth as an appendix to this notice. The proposed regulatory analysis is available at ERA's Office of Public Information, Room B-210, 2000 "M" Street, N.W., Washington, D.C. You are invited to comment on the proposed regulatory analysis.

(Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751 *et seq.*, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, 15 U.S.C. § 787 *et seq.*, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Policy and Conservation Act, 42 U.S.C. § 6201 *et seq.*, Pub. L. 94-163, as amended, Pub. L. 94-385, and Pub. L. 95-70; Department of Energy Organization Act, 42 U.S.C. § 7101 *et seq.*, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267.)

In consideration of the foregoing, Part 212 of Chapter II, Title 10 of the Code of Federal Regulations, is proposed to be amended as set forth below.

Issued in Washington, D.C., June 24, 1980.

**Hazel R. Rollins,**

*Administrator, Economic Regulatory Administration.*

1. Section 212.83(h)(2)(iv) is revised to read as follows:

**§ 212.83 Price rule.**

* * * * *

(h) *Equal application among classes of purchaser.*

* * * * *

(2) *Special rules.*

* * * * *

(iv) *Retail sales of gasoline by refiners.* Retail sales of gasoline are not subject to the provisions of paragraph (1) of this section.

* * * * *

2. Section 212.93(e)(1) is revised to read as follows:

**§ 212.93 Price rule.**

* * * * *

(e) Notwithstanding the provisions of subparagraph (a)(1) of this section:

(1)(i) except in sales of gasoline unless the gasoline is priced pursuant to subparagraph (a)(5) of this section: if a seller charges prices for a particular product that result in the recoupment of less total revenues than the total amount of increased product costs of that product incurred during the month, the amount of increased product costs not recouped by a price adjustment in the subsequent month pursuant to paragraph (a) of this section may also be added to the May 15, 1973, selling prices of that product in a subsequent month at the time the selling prices are computed pursuant to paragraph (a). A seller shall calculate its amount of increased product cost of a particular product not recouped, since the most recent price increase after November 1, 1973, to include the following: (A) any "increased product costs" not added to the May 15, 1973, selling price at the time of the most recent price increase implemented after November 1, 1973, multiplied by the volume sold since that price increase, plus (B) increases in the weighted average unit cost above the weighted average unit cost which was used to calculate the most recent price increase implemented after November 1, 1973, multiplied by the volume of product purchased at each such increased product cost, less, (C) any decrease in the weighted average unit cost from the weighted average unit cost which was used to calculate the most recent price increase implemented after November 1, 1973, multiplied by the volume of product purchased at each such lesser cost.

(ii) With respect to sales of gasoline by resellers and reseller-retailers which establish maximum lawful selling prices in other than retail sales pursuant to paragraph (a)(5) of this section and sales of other covered products, when a seller calculates its amount of increased product costs not recouped under this paragraph, it shall calculate its revenues as though the greatest amount of

increased product costs actually added to the May 15, 1973 selling price of that covered product and included in the price charged to any class of purchaser had been added in the same amount to the May 15, 1973 selling price of such covered product and included in the price charged to each class of purchaser; except that, where an equal amount of increased product cost is not included in the price charged to a purchaser because of (A) a price term of a written contract covering the sale of such product which was entered into on or before September 1, 1974, or (B) the provisions in paragraph (b)(1)(iv), such portion of the increased product costs not included in the price charged to such a purchaser need not be included in the calculation of revenues.

* * * * *

**§ 212.83 [Amended]**

*Alternative Proposal I*

1. Section 212.83(h) is deleted.

**§ 212.93 [Amended]**

2. Section 212.93(e)(1)(ii) is deleted.

*Alternative Proposal II*

1. Section 212.83(h)(2)(iv) is revised to read as follows:

**§ 212.83 Price rule.**

* * * * *

(h) *Equal application among classes of purchaser.*

* * * * *

(2) *Special rules.*

* * * * *

(iv) *Retail sales of gasoline by refiners.* (A)A particular retail sale is not subject to the provisions of paragraph (1) of this section when the amount of increased costs added to the particular May 15, 1973 selling price of gasoline at retail is equal to or greater than the weighted average amount of increased costs added to the May 15, 1973 selling price of gasoline at other than retail.

(B) When the amount of increased costs added to a particular May 15, 1973 selling price of gasoline at retail is less than the weighted average amount of increased costs added to the May 15, 1973 selling price of gasoline at other than retail, a refiner shall calculate increased costs for those sales as though the greatest amount of increased costs actually added to any May 15, 1973, selling price of gasoline and included in the price charged to any class of purchaser had been added to the May 15, 1973, selling price of that gasoline and included in the price charged in that retail sale.

(C) When a firm calculates the amount of increased costs not recouped that may be added to the May 15, 1973 selling price of gasoline to compute maximum allowable prices in a subsequent month, it may notwithstanding the general rule in subparagraph (1) above, with respect to retail sales of gasoline, include the amount by which the greatest amount of increased costs actually added to any May 15, 1973 selling price of gasoline to any class of purchaser exceeds the amount of increased costs which could have been added to the May 15, 1973 selling price in retail sales of gasoline but for the limitation in § 212.83 (c)(1)(i)(C).

* * * * *

2. Section 212.93(e)(1) is amended to add a new subparagraph (iii) to read as follows:

**§ 212.93 Price rule.**

* * * * *

(e)

* * * * *

(1)

* * * * *

(iii) When the amount of increased costs added to a specific May 15, 1973 selling price of gasoline at retail is equal to or greater than the weighted average amount of increased costs added to any May 15, 1973 selling price of gasoline in sales other than retail, such retail sale of gasoline is not subject to the provisions of subparagraph (e)(1)(ii) of this section.

* * * * *

*Alternative Proposal III*

1. Section 212.83(h)(2) (i) and (iv) are revised to read as follows:

**§ 212.83 Price Rule.**

* * * * *

(h) *Equal application among classes of purchaser.*

* * * * *

(2) *Special rules.*

* * * * *

(i) Sales of gasoline are not subject to the provisions of subparagraph (h)(i) of this paragraph except as provided in subparagraph (h)(2)(iv) of this paragraph.

* * * * *

(iv) *Retail sales of gasoline by refiners.* (A) A particular retail sale is not subject to the provisions of paragraph (1) of this section when the amount of increased costs added to the particular May 15, 1973, selling price of gasoline at retail is equal to or greater than the weighted average amount of increased costs added to the May 15, 1973, selling price of gasoline at other than retail.

(b) When the amount of increased costs added to a particular May 15, 1973, selling price of gasoline at retail is less than the weighted average amount of increased costs added to the May 15, 1973, selling price of gasoline at other than retail, a refiner shall calculate increased costs for those sales as though the greatest amount of increased costs actually added to any May 15, 1973, selling price of gasoline and included in the price charged to any class of purchaser had been added to the May 15, 1973, selling price of that gasoline and included in the price charged in that retail sale.

(C) When a firm calculates the amount of increased costs not recouped that may be added to the May 15, 1973, selling price of gasoline to compute maximum allowable prices in a subsequent month, it may notwithstanding the general rule in subparagraph (1) above, with respect to retail sales of gasoline, include the amount by which the greatest amount of increased costs actually added to any May 15, 1973, selling price of gasoline to any class of purchaser exceeds the amount of increased costs which could have been added to the May 15, 1973, selling price in retail sales of gasoline but for the limitation in § 212.83(c)(1)(i)(C).

* * * * *

2: Section 212.93(e)(1) is amended to add a new subparagraph (iii) to read as follows:

**§ 212.93 Price rule.**

* * * * *

(e) * * *

* * * * *

(1) * * *

* * * * *

(iii) Sales of gasoline are not subject to the provisions in subparagraph (ii) except when the amount of increased costs added to a specific May 15, 1973, selling price of gasoline at retail is less than the weighted average amount of increased costs added to any May 15, 1973, selling price of gasoline in sales other than retail.

* * * * *

**Appendix—Petroleum Price Regulations, Regulations and Emergency Planning, June 1980**

*Draft—Regulatory Analysis of Proposed Changes in the Equal Application Rule for Motor Gasoline*

**Summary**

*Retention of the Present Rule*

Because the amount of passthrough of increased costs is generally deemed to be equal within and between marketing levels under the current Equal Application Rule (Rule), the volume sold at one level of distribution and the market conditions at that level could be the determining factor for the cost passthrough at all levels of distribution. For example, if 90% of a seller's market was at wholesale and the remaining 10%, perhaps in another marketing area, was at retail, the seller's wholesale market conditions could determine the amount of the allowable increased costs passed through at both wholesale and retail. If wholesale demand is weak, the retail price would be lower than it might be without the Rule. At retail, the Rule may result in integrated marketers maintaining pump prices substantially below those that can be charged by independent retailers purchasing gasoline from them and, moreover, can result in refiners having prices, in a PAD District, that there are perhaps 6 or more cents above or below the local market level. To the extent the refiner's pump price is below the local market, this contributes to gasoline lines forming at their stations, is an unnecessary waste of fuel, confuses the consumer, and is inequitable.

At the other levels of distribution the Rule may provide additional protection from price discrimination, but it also could prevent adjustments for market demand and changing business practices over the last 7 years and may continue to preserve price anomalies that existed on May 15, 1973.

*Eliminating Equal Application for Retail Sales*

Elimination of the Rule at retail is widely supported by all segments of the industry, including the independent retail dealters, who complain of unfair price competition by refiner-owned stations that directly results from the regulation.

This regulatory change would eliminate the equal application rule with respect to retail sales of gasoline by refiners and by reseller-retailers who have not adopted the standard fixed cents per gallon margin pricing system effective May 1, 1980. The one restriction would be that the retail prices of reseller-retailers could be no higher than their Dealer Tankwagon price to the nearest independent retailer plus the markup allowed independent retailers. This would allow the passthrough of additional increased costs in retail sales and permit marketers to raise or lower retail prices at the individual retail stations operated by the marketer, within that limit, to reflect local market conditions without incurring the equal application penalty.

Under the proposed amendment, marketers would have pricing flexibility to use allowable increased costs, to the extent they are available, to charge competitive prices without penalty. There will be no actual increase in allowable costs that may be passed through, because increased costs used at retail will result in a reduction in the allowable increased costs available for use at other marketing levels or in the firm's banks.

This amendment will result in motorists being less confused by price variations in the locality. This would reduce possible lines at the least costly stations and minimize the possibility that motorists would travel greater distances than necessary to secure lower cost gasoline. It would also allow independent retailers to be more competitive as they would not be required to lower their prices or increase their hours of operation to retain customers.

*Elimination of the Equal Application Rule*

Generally, this proposal approximates a free market situation, except that prices would still be constrained by the amount of increased costs incurred. Unrecovered increased costs could still be banked for possible future recovery, but that potential recovery could still be less than allowed by free market prices in a shortage situation.

The major advantage of this proposal is that it would allow refiners and applicable reseller-retailers and resellers to adjust their pricing practices which have been relatively frozen since May 15, 1973, at all wholesale and retail levels. It would allow marketers to make adjustments to reflect changes in the types of marketing operations in which its customers are engaging, *e.g.*, increased sales to other than regular customers. Adjustments also could be made to correct any anomalies that happened to exist on that base date. Additionally, it would allow marketers greater pricing flexibility and thus be competitive at all levels of distribution. This will allow other marketers who are their customers (especially retail dealers) to be more competitive in the marketplace.

For example, the Rule has perpetuated for almost 7 years special circumstances that existed in cargo (barge) prices at the major distribution center of New Orleans, Louisiana. Because of a tight gasoline supply situation on May 15, 1973, refiners were charging cargo buyers, usually large independent marketers, prices based on spot market costs. Those prices closely approximated the dealer tankwagon prices charged to retailers. Thus, as long as price controls have been in effect, the Rule has kept cargo prices at New Orleans unnecessarily high and independent marketers have been disadvantaged by this situation. Also it may be contrary to the purposes of certain anti-trust laws.

A number of price adjustments will almost certainly be made following deregulation. Allowing them to occur prior to that time will create less turmoil in the post-deregulation market. It will also be easier to identify and correct any serious inequities that might occur while price controls are still in effect rather than after they have expired.

*Elimination of the Equal Application Rule at the Retail Level to the Extent Prices Are Increased More Than the Weighted Average of Wholesale Prices*

This proposal would discourage refiners from attempting to recover more increased allowable costs from wholesale customers than from retail customers. To the extent that retail sales are more costly because of the lower volume of individual sales or the higher expenses, the alternative would probably not be restrictive. There could be instances, however, where the cost of wholesale sales might exceed the cost of a retail sale, which would result in a transfer of costs to retail customers to prevent being subject to the Rule. In addition, if there should be an oversupply of gasoline in an area where the marketer has retail outlets, the supply/demand situation in another area where the marketer's wholesale operations are located could effectively prevent a reduction in the retail price.

As with other options of this type, this alternative tends to preserve any anomalies in the May 15, 1973, pricing of products and to discourage any price adjustments appropriate due to changes in the cost of supplying particular customers.

*Elimination of the Equal Application Rule at All Levels to the Extent Retail Prices are Increased More Than Wholesale Prices*

The third alternative would allow different passthroughs of allowable increased costs to various wholesale and different retail customers without the Rule's penalty, but the Rule's imputed cost recovery would apply in any instances where the marketer passes through less increased costs to a retail customer than the weighted average passthrough to other classes of purchasers. Thus, there would be a disincentive for refiners to lower prices at their own retail outlets in order to increase their market share.

To the extent refiners increase their own retail prices more than their other prices, it would benefit their reseller customers and independent retailers with whom the refiner-retailer is competing. The independent retailer could increase its selling price and still be competitive, while the independent reseller would have a lower cost for gasoline from the refiner and thus be more competitive.

*Banked Costs*

In assessing the potential impact of modifying or eliminating the Rule under each of the alternatives, there should be consideration of whether refiners would draw down their previously unrecovered increased costs ("banks") at a faster rate than otherwise would occur. In February 1980, total banks for all refiners amounted to $7.8 billion, double the level during the period up to the first quarter in 1979. Banks attributable only to motor gasoline for all refiners increased from $2.2 to $6.5 billion over the same period of time.[1]

It is important to note that there is no constant correlation between an individual refiner's level of banks and that refiner's gasoline prices. For example, several refiners with high banks have average cost passthroughs and prices.

Some refiners are currently unable to raise prices because of competition. That is, supply

[1] EIA, *Weekly Petroleum Status Report*, May 30, 1980, Pg. 7.

is plentiful and demand is down. There most likely would be some impact on prices, however, within particular market areas. Where refiners' retail and dealer tankwagon costs had been constraining independent dealers' gasoline prices, there may be increases. However, to the extent that refiners are constrained by Council on Wage and Price Stability (COWPS) guidelines in passing through increased costs, the impact will be minimal (when they go up in one area, they may go down in another or increases to one class of customer may be balanced by decreases to another). Any such decreases in prices would tend to require competing independent dealers to reduce their prices.

In summary, the banks of prior increased costs partially represent crude oil and gasoline stocks and will be retained for use when stocks are eventually sold. In part, they represent voluntary compliance with COWPS guidelines restricting profit margins. Neither circumstances would be changed by the proposed regulation. This assumption is further supported by refiners with prices appreciably below market levels having sizable banks of increased costs. Some possibility exists, however, that a small portion of banked costs could be used to make market adjustments in certain areas.

*Conclusion*

Our conclusion, subject to revision based on testimony, written comments and additional study, is that current market conditions allow elimination of the Rule and that doing so will have no adverse economic effect on the industry or the consuming public.

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INDEX

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# federal register

# index

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TABLE OF CONTENTS

Presidential and Agency entries ..... 1
Privacy Act Publications ..... 176
Federal Register Pages and Dates ..... 179

# FEDERAL REGISTER INDEX, ANNUAL 1978

## THE PRESIDENT

*(See also Executive Office of President)*


**ENERGY EMERGENCY DETERMINATIONS**

Alabama, 12285
Indiana, 12275, 12287
Kentucky, 12277, 12289
Maryland, 12281
Ohio, 12273, 12283
Pennsylvania, 12279, 13365

**EXECUTIVE ORDERS**

ACTION cooperative volunteers, former; appointment to civilian career service (EO 12034), 1917
Airport and Airway Development Act, authorization of department and agency functions (EO 12079), 42233
Antitrust Laws and Procedures, National Commission for the Review of; membership (EO 12052), 15133
Armed Forces promotions and disability separations, suspension of certain limitations (EO 12082), 42727
Bituminous coal industry; Board of Inquiry, creation (EO 12042), 9269
Child, 1979, National Commission on the International Year of the; establishment (EO 12053), 16147
Child support and alimony, garnishment of moneys; enforcement of legal obligations (EO 12105), 59465
Circuit Judge Nominating Commission, U.S.; establishment (EO 12059), 20949
Civil Rights Act of 1964, transfer of certain functions to Attorney General (EO 12068), 28971
Civil service rules, amendments; notice of exemptions from competitive service (EO 12043), 9773
Coal Industry, President's Commission on the; establishment (EO 12062, 12103), 23555, 58537
Commemorative Presidential proclamations, simplification of procedures (EO 12080), 42235
Cost of living allowances, adjustment (EO 12070), 28977
Defense economic adjustment programs (EO 12049), 13363
Diplomatic missions and personnel; privileges, immunities, and liabililty insurance (EO 12101), 54195
Domestic Policy Staff, Office of Drug Abuse Policy, and Economic Opportunity Council; transfer of functions (EO 12045), 13347
Energy Coordinating Committee, establishment (EO 12083), 44813
Environmental evaluation functions; transfer (EO 12040), 8097
Equal employment opportunity, contract compliance functions (EO 12086), 46501
Equal employment opportunity programs, Federal; coordination (EO 12067), 28967
Executive Schedule; placement of certain positions in Levels IV and V (EO 12035, 12060, 12069, 12076, 12099), 3073, 21315; 28973, 37161, 54191
Foreign assistance programs, inspection (EO 12066), 28965
Foreign intelligence activities, U.S.; organization and control (EO 12036), 3674
Foreign Language and International Studies, President's Commission on; establishment (EO 12054), 17457
Foreign Language and International Studies, President's Commission on; extension (EO 12090), 50997
Generalized System of Preferences, eligible articles and beneficiary developing countries; modification (EO 12041, 12104), 8099, 59053
Holocaust, President's Commission on the; establishment (EO 12093), 51377
Imported objects of cultural significance (EO 12047), 13359
Improving Government regulations (EO 12044), 12661
Industry and Trade Administration, Commerce Department; compensation of certain officials (EO 12096), 51597
Inflationary procurement practices, prohibition (EO 12092), 51375
Interagency Coordinating Council, establishment (EO 12075), 36877
International Communication Agency, establishment (EO 12048), 13361
Judicial Nominating Commission for the District of Puerto Rico; establishment (EO 12084), 44815
Military Appeals Nominating Commission, U.S. Court of; establishment (EO 12063), 24659
National security information, classification and declassification (EO 12065), 28949
Naturalization requirements based on military service, termination (EO 12081), 42237
Norfolk & Western Railway Co., labor-management dispute; creation of emergency board (EO 12085), 45337
Nuclear material, special; export to India (EO 12055), 18157
Nuclear non-proliferation functions (EO 12058), 20947
Pay and allowances, adjustment of certain rates (EO 12087), 46823
Pension Policy, President's Commission on (EO 12071, 12100), 30259, 54193
Physical Fitness and Sports, President's Council on (EO 12098), 53411
Pollution control standards, Federal compliance (EO 12088), 47707
Procurement in labor surplus areas, Federal (EO 12073), 36873
Productivity Council, National; establishment (EO 12089), 49773
Public international organizations; removal of certain organizations from list of those entitled to privileges and immunities (EO 12033), 1915
Retirement, mandatory, exemptions:
Minetti, G. Joseph (EO 12037, 12056), 4415, 18639
Sessums, Roy T. (EO 12077), 37163
Science and technology policy functions; transfer (EO 12039), 8095
Sea duty, special pay (EO 12094), 51379
Small Business Conference Commission; establishment (EO 12061), 21865
Small Business Conference Commission (EO 12091), 51373
Space management, Federal (EO 12072), 36869
Tax Court Nominating Commission, U.S.; establishment (EO 12064), 24661
Telecommunications functions; transfer (EO 12046), 13349
Trade Policy Committee and East-West Foreign Trade Board; membership adjustments (EO 12102), 54197
U.S.-Hungarian trade agreement (EO 12051), 15131
U.S. district judges, merit selection standards and guidelines (EO 12097), 52455
Urban and community impact analyses (EO 12074), 36875
Wien Air Alaska, Inc., labor-management dispute; creation of emergency board (EO 12095), 51595
Women, National Advisory Committee for:
Establishment (EO 12050), 14431
Membership (EO 12057), 19811
World Hunger, Presidential Commission on; establishment (EO 12078), 39741

**LETTERS**

Stainless steel pipe and tube, welded; disapproval of USITC determination (April 22), 17789

**MEMORANDUMS**

African countries; military assistance (January 18), 6203
African refugees; financial assistance (February 2), 7307
Baits and flies, artificial; denial of import relief (November 22), 55233
Bicycle tires and tubes, denial of import relief (October 30), 50995
Bolts, nuts, and large screws of iron or steel; import relief (February 10, December 22), 6575, 60259
Citizens band radio transceiver industry; import relief (March 27), 12843
Clothespin industry, denial of import relief (October 2), 45547
Copper industry, unwrought, unalloyed; denial of import relief, 49523
Federal Statistical System; review (May 11), 20779
Ferrochromium, high carbon; imports (January 27, November 2), 4245, 51599

Hungary, financial assistance (August 18), 38679
Indochinese refugees:
Emergency assistance funds (December 6), 58535
Financial assistance (February 13), 8247
Indonesia; F-5E and F-5F aircraft sales (March 21), 13999
Latin American refugees; financial assistance (February 15), 8249
Security assistance functions, performance by defense attaches (June 12), 27155
Somalia and Djibouti, refugees; assistance (May 23), 25415
Stainless steel table flatware industry, import relief; denial (June 30), 29259
Trade agreements with U.S.:
Hungary (April 7 and June 2), 16689, 16691, 25985
Romania (June 2), 25983
Trading With the Enemy Act, extension of authorities (September 8), 40449
Tunisia, sale of TOW anti-tank missle system (August 11), 38677
Turkey, sale of defense articles and services (March 24), 15603
U.S.-Turkish relations, military cooperation; resumption determination (Sept. 26), 46821, 46953
Zaire, assistance (May 18), 22169

**DESIGNATIONS**

National security information, Executive Office officials to classify (June 28), 28963

**PROCLAMATIONS**

Alaskan national monuments:
Admiralty Island (Proc. 4611), 57009
Aniakchak (Proc. 4612), 57013
Becharof (Proc. 4613), 57019
Bering Land Bridge (4614), 57025
Cape Krusenstern (Proc. 4615), 57031
Denali (Proc. 4616), 57035
Gates of the Arctic (Proc. 4617), 57043
Glacier Bay (Proc. 4618), 57053
Katmai (Proc. 4619), 57059
Kenai Fjords (Proc. 4620), 57067
Kobuk Valley (Proc. 4621), 57073
Lake Clark (Proc. 4622), 57079
Misty Fiords (Proc. 4623), 57087
Noatak (Proc. 4624), 57091
Wrangells-St. Elias (Proc. 4625), 57101
Yukon Flats (Proc. 4627), 57119
Yukon-Charley (Proc. 4626), 57113
Alloy tool steel, imports; modification of limitations (Proc. 4559), 14433
Ceramic tableware, imports; termination of increased rates of duty (Proc. 4604), 45977
Citizens band radio transceivers, imports (Proc. 4561), 15127
Ferrochromium imports; high carbon; duty increase (Proc. 4608), 53701
Finland, papermaking machinery (Proc. 4630), 59049, 59467
Humphrey, Hubert H., death of; display of flag at half staff (Proc. 4545), 2375
Hungary, trade agreement with U.S. (Proc. 4560), 15125
India, imports; reduction of rates of duty (Proc. 4600), 43285
Knoxville International Energy Exposition of 1982 (Proc. 4628), 57861
Meat, imports; limitation (Proc. 4577), 29261
Northern Mariana Islands; application of certain U.S. laws (Proc. 4568), 19999
Petroleum and petroleum products, imports (Proc. 4629), 58077
Sugar, sirups, and molasses, imports (Proc. 4547, 4610), 3251, 56869
*Special observances:*
American Education Week (Proc. 4603), 44817
Architectural Barrier Awareness Week, National (Proc. 4566), 17795
Armed Forces Day, 21313
Aviation Year, National, and Wright Brothers Day (Proc 4584), 35467
Bill of Rights Day, Human Rights Day and Week, 1978 (Proc. 4609), 56009
Cancer Control Month (Proc. 4552), 11141
Captive Nations Week (Proc. 4578), 30033
Child Health Day (Proc. 4587), 36883
Citizenship Day and Constitution Week (Proc. 4579), 31117
Columbus Day (Proc. 4586), 36881
Drug Abuse Prevention Week (Proc. 4544), 1919
Education Day, U.S.A. (Proc. 4562), 16441
Employ the Handicapped Week, National (Proc. 4593), 40197
Family Week, National (Proc. 4606), 49519
Farm Safety Week, National (Proc. 4556), 11959
Farm-City Week, National (Proc. 4602), 44465
Father's Day (Proc. 4574), 25413
Fire Prevention Week (Proc. 4581), 35461
Flag Day and National Flag Week (Proc. 4573), 23553
Forest Products Week, National (Proc. 4599), 43283
Free Enterprise Day (Proc. 4576), 28975
General Pulaski's Memorial Day (Proc. 4582), 35463
Good Neighbor Day, National (Proc. 4601), 43429
Grandparents Day, National (Proc. 4580), 34753
Heart Month, American (Proc. 4546), 3071
Hispanic Heritage Week, National (Proc. 4585), 36879
Historic Preservation Week, National (Proc. 4569), 20215
Jogging Day, National (Proc. 4605), 47711
Law Day, U.S.A. (Proc. 4565), 17793
Leif Erikson Day (Proc. 4592), 39739
Literacy Day, International (Proc. 4589), 37417
Loyalty Day (Proc. 4567), 18533
Lupus Week, National (Proc. 4588), 37159
Maritime Day, National (Proc. 4555), 11561
Mother's Day (Proc. 4570), 20473
National Guard Day (Proc. 4598), 43011
Oceans Week, National (Proc. 4563), 16443
Older Americans Month (Proc. 4564), 16965
Pan American Day and Pan American Week (Proc. 4557), 12671
Poison Prevention Week, National (Proc. 4550), 4961
Port Week, National (Proc. 4596), 41941
Prayer, National Day of (Proc. 4572, 4591), 21999, 39561
Red Cross Month (Proc. 4551), 5495
Save Your Vision Week (Proc. 4549), 4583
School Lunch Week, National (Proc. 4594), 40451
Small Business Week (Proc. 4553), 11557
Sun Day (Proc. 4558), 13051
Thanksgiving Day (Proc. 4607), 49521
Transportation Day, National Defense, and National Transportation Week (Proc. 4548), 4413
United Nations Day (Proc. 4597), 42725
University Press Centennial Observance (Proc 4575), 25987
Veterans Day (Proc. 4595), 41013
White Cane Safety Day (Proc. 4583), 35465
Women's Equality Day (Proc. 4590), 38567
World Trade Week (Proc. 4554), 11559

**RECOMMENDATIONS APPROVED BY PRESIDENT**

Radiation protection guidance to Federal agencies for diagnostic x rays; EPA and HEW, 4377

**REORGANIZATION PLANS**

Reorganization Plans of 1978:
No. 1, Equal employment opportunity, 19807
No. 2, Civil service, 36037
No. 3, Federal Emergency Management Agency; establishment, 41943
No. 4, Employee Retirement Income Security Act transfers, 47713

# EXECUTIVE AGENCIES

## ACCIDENTS

*See National Transportation Safety Board.*

## ACTION

**RULES**

Conduct standards, 46022

**PROPOSED RULES**

Conduct standards, 14072
Nondiscrimination:
Handicapped in federally-assisted programs; enforcement coordination, 19883
Volunteer and employee applicants; exclusion of persons formerly engaged in intelligence activities, 14077

**NOTICES**

Family violence demonstration grant; applications closing date, 22226, 23750
Foster Grandparent and Senior Companion Programs; income eligibility levels, 2743, 24341
Improving Government regulations, 22325, 52506
Meetings:
Consumer Cooperative Bank National Interagency Task Force, 59855
National VISTA grants for 79 FY; evaluation procedures for continuation of current grants, 58207
National VISTA grants for 79 FY; revised procedures, 46153, 50488
Privacy Act; systems of records, 3732, 10421, 13406, 37476, 56924
Privacy Act; systems of records; annual publication, 39928
Vista Program, domestic and anti-poverty operations; guidelines, 9833

## ACTUARIES, JOINT BOARD FOR ENROLLMENT


**RULES**

Actuarial services under ERISA; suspension and termination of enrollment of actuaries, 39757

**PROPOSED RULES**

Actuarial services; suspension and termination of enrollment of actuaries, 6626

**NOTICES**

Advisory committee review; inquiry, 5903
Committees; establishment, renewals, terminations, etc.:
  Joint Board Actuarial Examinations Advisory Committee, 39864
Meetings:
  ERISA actuarial services examinations, 25743
  Joint Board Actuarial Examinations Advisory Committee, 1140, 8861, 10983, 21952, 53067


## ADDITIVES


*See Environmental Protection Agency.*
*Food and Drug Administration.*


## ADMINISTRATION OFFICE, EXECUTIVE OFFICE OF PRESIDENT


**NOTICES**

Committees; establishment, renewals, terminations, etc.:
  Financial Reporting for Executive Office of President Advisory Committee, 48744


## ADMINISTRATIVE COMMITTEE OF FEDERAL REGISTER


*See Federal Register Office.*


## ADMINISTRATIVE CONFERENCE OF UNITED STATES


**RULES**

Bylaws; avoidance of conflicts of interest, 28806
Conduct standards, 28807
Recommendations:
  Ratemaking cases, social security disability claims, and time limits on agency actions, 27507

**NOTICES**

Improving government regulations; guide to agency reports, 36412
Meetings:
  Agency Decisional Processes Committee, 4446, 9176, 20258, 41247, 47586, 50488, 54280
  Agency Organization and Personnel Committee, 5555, 9759, 12897, 21026, 47586
  Compliance and Enforcement Proceedings Committee, 54280
  Grants, Benefits and Contracts Committee, 4446, 10948, 40253, 43745, 50007, 55810
  Informal Action Committee, 21706, 31050, 55810
  Judicial Review Committee, 21706, 41418, 46984
  Licenses and Authorizations Committee, 11244, 27873, 42774
  Plenary Sessions, 21026, 56077
  Ratemaking and Economic Regulation Committee, 52272
  Rulemaking and Public Information Committee, 6115, 22226, 46984, 51823
Sunshine Act Interpretive Guide; availability, 25157


## ADVERTISING


*See Federal Trade Commission.*


## ADVISORY COMMITTEE ON FEDERAL PAY


*See Federal Pay, Advisory Committee.*


## ADVISORY COUNCIL ON HISTORIC PRESERVATION


*See Historic Preservation, Advisory Council.*


## AGED


*See ACTION.*
*Aging, Federal Council.*
*Health, Education, and Welfare Department.*
*Social Security Administration.*


## AGENCY FOR INTERNATIONAL DEVELOPMENT


**RULES**

Commodity transactions financed by AID; eligible transportation costs, etc., 25998
Environmental procedures:
  Pesticides; procurement or use, 20491
Nonmilitary economic development training programs, payments to participants:
  Per diem payments, 58815
Procurement, 14471, 15627, 15628, 24839, 24841
Security information regulation, 55944

**PROPOSED RULES**

Voluntary foreign aid; agency registration, 38854

**NOTICES**

Advisory committee review; inquiry, 8215
Annuitants, limits on compensation; inquiry, 26511
Authority delegations:
  Administrator; order of succession, 10663
  Afghanistan, Mission Director; contracting functions, 2251
  Afghanistan, Mission Director, et al.; loan and grant agreements, 9402, 47036
  Africa, principal AID officers; operational program grants, 52569
  American Schools and Hospitals Abroad Office, Director; foreign assistance, etc., 27629
  Asia, Mission Director, et al.; loan and grants source waivers, 58128
  Barbados, Caribbean Regional Programs, AID Affairs Officer; contracting functions, 11879
  Barbados, U.S. Ambassador; loan agreements, 8897
  Bolivia, Mission Director; contracting functions, 11880
  Botswana, Mission Director; contracting functions, 51886
  Chile, AID Representative, contracting functions, 51886
  Colombia, Mission Director; contracting functions, 51886
  Commodity Management Office, Director; transportation source, 25894
  Contract Management Office, Director; contracting functions, 14196
  Costa Rica, Mission Director; contracting functions, 11880
  Damascus Mission Director; contracting functions, 14196
  Development Support Bureau, Assistant Administrator; agriculture program, etc., 28281
  Dominican Republic, Mission Director, contracting functions, 11881
  Ecuador, AID Affairs Officer; contracting functions, 51885
  Egypt, Mission Director; contracting functions, 2252
  Egypt, Mission Director, et al.; transfer of funds, etc., 8321
  Egypt, Mission Director; loan and grant agreements, 47036
  El Salvador, Mission Director; contracting functions, 11881
  Executive Secretary; information classification, 22797
  Fiji, Regional Development Officer; contracting functions, 43789
  Food for Peace, Coordinator; authorities of Assistant Administrator, Private and Development Cooperation Bureau, 27628
  Foreign Disaster Assistance Office, Director; authorities of Assistant Administrator, Private and Development Cooperation Bureau, 27629
  Gibson, Robert; sign contracts, etc., 25893
  Guatemala, Director (ROCAP); contracting functions, 11879
  Guatemala, Mission Director; contracting functions, 11881
  Guyana, Mission Director; contracting functions, 11882
  Haiti, Mission Director; contracting functions, 11882
  Honduras, Mission Director; contracting functions, 11882
  India, Mission Director; loan agreements, 32007
  India, Mission Director; loan and grant agreements, 20289
  Israel, Diplomatic Officer; foreign assistance program, 40331
  Italy, earthquake reconstruction program coordinator; grant agreements, 32007
  Italy, Program and Management Services Bureau, Assistant Administrator; grant agreements, 32006
  Jamaica, Mission Director; contracting functions, 11882
  Jordan, AID Representative; contracting functions, 2252
  Jordan, Mission Director; loan and grant agreements, 47036
  Labor Affairs Office, Director, 27630
  Latin America, Asia, Near East, Principle AID Officers; operational programs grants, 24927
  Lesotho, Mission Director; contracting functions, 51887
  Malawi, Principal Diplomatic Officer, 46616
  Mexico, Regional Technical Aids Center, Director; contracting functions, 11880

Morocco, Mission Director; contracting functions, 2252
Morocco, Mission Director, loan and grant agreements, 47036
Near East Bureau, Project Development Office, Director, et al.; loan and grant agreements, 47037
Near East Bureau, Project Development Office, Division Chiefs, loan and grant agreements, 57994
Near East Bureau, Technical Support office, Director, et al.; loan and grant agreements, 47037
Nicaragua, Mission Director; contracting functions, 11883
Paraguay, Mission Director; contracting functions, 11883
Personnel and Training Office, Director; personnel functions, 52084
Peru, Mission Director; contracting functions, 11883
Portugal, AID Representative; contracting functions, 51885
Portugal, Mission Director; loan and grant agreements, 47036
Private and Development Cooperation Bureau, Assistant Administrator; Food for Peace program, etc., 27627
Program and Management Support Office, Director, et al.; extension of time on projects, etc., 27629
Regional Assistant Administrators; bilateral and regional population programs, 36546
Regional Assistant Administrators, et al.; procurement, 11293
Regional Operations Division, Chief, et al.; contracting functions, 14196
Reimbursable Development Programs, Coordinator; funds expenditure authorizations, etc., 27629
Services Operations Division, Chief; editorial changes, 14196
Somalia, AID Representative; contracting functions, 34858
South Pacific, AID Representative; contracting functions, 58129
South Pacific, AID Representative; loan agreements, 51887
Southern Africa Regional Affairs Coordination Office; contracting functions; canceled, 51887
Sri Lanka, AID Representative; project agreements, trust fund agreements, and grants, 7493
Sudan, AID Representative; contracting functions, 34858
Swaziland, Mission Director; contracting functions. 51887
Syria, AID Representative, et al.; contracting functions, 2251
Syria, Mission Director; loan and grant agreements, 47036
Tunisia, Mission Director; contracting functions, 2251
Tunisia, Mission Director; loan and grant agreements, 47036
Turkey, AID Representative; contracting functions, 38656
Uruguay, AID Representative; contracting functions, 11879
Yemen, Mission Director; contracting functions, 2252
Yemen, Mission Director; loan and grant agreements, 47038
Zambia, Principal Diplomatic Officer, 46616
Committees; establishment, renewals, terminations, etc.:
Research Advisory Committee, 58876
Commodity import program loan:
Zambia, 9402
Food and agricultural development, grants, etc.; eligible universities, 37049
Housing guarantee programs:
Botswana, 3785, 25893
Jamaica, 8897, 10999
Lebanon, 25399
Housing guarantee programs; prescription of rate, 19746
Improving Government regulations; inquiry, 24218
Meetings:
International Food and Agricultural Development Board, 1577, 3785, 4701, 5448, 8048, 8049, 9546, 12774, 15025, 17436, 17437, 19309, 20070, 22261, 24394, 26809, 28598, 31078, 37782, 37783, 42830, 46616, 49084, 49874, 51493, 54710, 55025, 57994, 59945, 59946
Research Advisory Committee, 3786, 24394, 43789, 57361
Voluntary Foreign Aid Advisory Committee, 6349
Organization and functions, 33984
Pest management program; interim procedures, etc.:
Liberia; waiver, 8320, 19309
Privacy Act; systems of records; annual publication, 43632
Zambia, refugee assistance; determination and waiver, 46401

## AGING, FEDERAL COUNCIL

NOTICES

Meetings:
Aspects of Older Americans Act study, 39176
Asset testing study et al., 52290
Council on Aging, 47290
Long Term Care Committee, 36003, 42041, 58636
Policy Development And Program Evaluation Committee, 36003
Senior Services Committee, 36003
Special Aging Populations Committee, 38114

## AGING ADMINISTRATION

*See Human Development Services Office.*

## AGRICULTURAL COMMODITIES AND PROGRAMS

*See Agricultural Marketing Service.*
*Agricultural Stabilization and Conservation Service.*
*Agriculture Department.*
*Animal and Plant Health Inspection Service.*
*Commodity Credit Corporation.*
*Federal Crop Insurance Corporation.*
*Federal Grain Inspection Service.*
*Food and Drug Administration.*
*Food Safety and Quality Service.*
*Packers and Stockyards Administration.*

## AGRICULTURAL MARKETING SERVICE

RULES

Almonds grown in Calif., 36593, 36885, 47969, 56013
Apricots grown in Wash., 28434, 28996, 52197
Avocados, imported, 29932, 32118
Avocados grown in Fla., 3898, 22660, 23557, 28433, 30037, 32116, 39322
Celery grown in Fla., 1475, 2818, 15609, 27159, 35019, 57240
Cherries grown in Mich. et al., 8116, 34104
Cherries (sweet) grown in Wash., 28996, 28997
Corn; standards, 2816
Cotton:
Classification, futures legislation; bona fide spot cotton market removal; Augusta, Ga.; effective date delayed, 29263
Cranberries grown in Mass. et al., 1474, 29764, 29765, 46831
Dates (domestic) produced in Calif., 4250, 28435, 56013
Filberts grown in Oreg. and Wash., 47970, 57240, 60428
Fruits; imported, 19340, 52199
Grain standards, etc.; fees for inspection, reduction, 52019
Grapefruit grown in Ariz. and Calif., 57582
Grapefruit grown in Fla., 2385, 57140
Grapefruit imports, 43014
Grapes (Tokay) grown in Calif., 35259, 37981, 43703
Hops of domestic production, 10903, 36044
Lemons grown in Ariz. and Calif., 970, 1061, 1929, 2817, 3694, 4587, 5796, 6914, 7609, 8786, 9788, 11143, 12307, 13493, 14303, 14641, 15608, 16969, 17798, 18160, 19348, 20476, 21640, 22670, 23986, 24663, 25136, 25991, 27158, 28433, 29265, 29931, 30267, 31313, 32740, 34430, 35647, 36593, 37981, 39080, 39319, 39955, 41372, 41950, 43016, 44825, 46288, 47485, 48991, 50159, 51601, 52462, 53701, 54935, 56212, 57583, 58542, 59827, 60863
Lettuce grown in Tex., 2386, 5499, 13055, 50159, 53704, 58355
Limes, imported, 22002
Limes grown in Fla., 16149, 22002, 28433, 39320
Livestock; grading, certification, and standards:
Fees increase, 45979
Milk marketing orders:
Central Arkansas, 39333
Chicago, 51384
Eastern Ohio-Western Pennsylvania, 33897, 38798, 40801
Fort Smith, Ark., 39329
Indiana, 15136
Inland Empire, 39955, 58079
Iowa, 24516
Lake Mead, 4589
Lubbock-Plainview, Tex., 39334
Memphis, Tenn., 39328
Middle Atlantic, 18988, 39745, 49285, 53413
Neosho Valley, 36235, 39325
New England, 17459, 49971
Oklahoma Metropolitan, 39331
Paducah, Ky., 54920
Puget Sound, Wash., 42729
Red River Valley, 39329
Rio Grande Valley, 39338
Southern Michigan, 36045, 38570
Texas, 27777, 39335, 44825

Texas Panhandle, 39337
Upper Midwest, 19341
Wichita, Kans., 39326
Nectarines grown in Calif., 2385, 20219, 29265, 30267
Olives grown in Calif., 24822, 39744, 43704
Onions, imported, 5500
Onions grown in Idaho and Oreg., 31125, 32739
Onions grown in Tex., 1475, 2818, 4587
Oranges, grapefruit, tangerines, and tangelos grown in Fla., 2385, 2821, 5498, 9455, 10901, 17797, 20475, 24821, 29525, 32397, 43014, 52197, 52198, 53028, 54218, 54617, 57139, 58175, 58353, 59335
Oranges and grapefruit grown in Tex., 4033, 43703, 50866, 51000, 57912, 59077
Oranges (navel) grown in Ariz. and Calif., 753, 969, 1785, 2719, 3543, 3897, 4417, 4966, 5499, 6792, 7421, 8505, 9586, 10902, 11961, 13367, 14435, 15407, 16697, 54618, 56012, 57239, 58354, 59470, 60428
Oranges (Valencia) grown in Ariz. and Calif., 8506, 8785, 9586, 10902, 11962, 13054, 13367, 13492, 14436, 15408, 16698, 17935, 19193, 19643, 20218, 21636, 22330, 23702, 24822, 26689, 28169, 29101, 30036, 31119, 32398, 34103, 35469, 36428, 37679, 38797, 39743, 42247, 58789
Packers and stockyards:
Practice rules, 30510
Transfer of functions, 19351
Packers and stockyards; policy statements:
Posted stockyards rate orders, 46956
Rates and charges, 46494
Papayas grown in Hawaii, 1785, 19813, 27776, 46955, 58176
Peaches (fresh) grown in Ga., 18642, 20476, 22171, 25331, 28808, 29931, 47486
Peaches (fresh) grown in Wash., 28996, 30790
Peaches grown in Colo., 32398, 34103
Pears, Bartlett (fresh), grown in Oreg. and Wash., 39323
Pears, plums, and peaches (fresh) grown in Calif., 2385, 20220, 21637, 27982, 29526, 29564, 30267, 32430, 38369, 58355
Pears (Beurre D'Anjou, etc.) grown in Calif., Oreg., and Wash., 31120, 39323, 45342
Perishable agricultural commodities:
Misrepresentation or misbranding, 4964, 59470
Practice rules, determination of responsibly connected person, 30787, 59470
Plant variety protection; limits of reciprocity:
Israel, 9782
Potato research and promotion plan:
Expenses and rate assessment, 23557
Handlers, assessment responsibilities, 51001
Handlers, assessments on seed potatoes, 9133
Potatoes (Irish) grown in Calif. and Oreg., 12845, 31314, 32119
Potatoes (Irish) grown in Colo., 21638, 26689, 29266, 32121, 37982, 45980
Potatoes (Irish) grown in Idaho and Oreg., 28808, 31121, 33676
Potatoes (Irish) grown in Southeastern States, 21638, 21639
Potatoes (Irish) grown in Wash., 31123, 31882, 52199
Prunes (dried) produced in Calif., 5355, 32399, 33229, 40199
Prunes (fresh) grown in Oreg. and Wash., 28996, 31001
Raisins, imported, 47971, 57863
Raisins produced from grapes grown in Calif., 13493, 27983, 47970, 50867
Rice; Federal inspection services fees, reduction, 31881
Tobacco, cigar leaf, grown in Fla. and Ga., 2627
Tobacco, cigar leaf, grown in Fla. and Ga.; CFR Part removed, 46289
Tobacco (flued-cured), 56874
Tobacco inspection:
Burley, untied; experimental sales, 45341
Fees and charges for permissive inspection, 59469
Flue-Cured Tobacco Advisory Committee, 16309
Service fees, 9585
Tomatoes, imported; grade, size, quality and maturity exemptions, 3349
Tomatoes grown in Fla., 45342, 46832, 52200, 59471
Tomatoes grown in Tex., 47486
Walnuts grown in Calif., 47487
Warehouses, regulations:
Grain, 14005, 60427
Wheat and wheat foods research and nutrition education, 51604
Wool and mohair advertising and promotion:
ASPC-USDA agreement, 32122
Referendum, 32125, 32127

**PROPOSED RULES**

Almonds grown in Calif., 39393, 51405
Apples grown in Conn. et al.; proposal and hearing, 50691
Apricots grown in Wash., 23585
Avocados, imported, 17948
Avocados grown in Fla., 974, 2401, 13067, 18182, 19235, 19398
Celery grown in Fla., 12329, 30066, 46549
Cherries grown in Mich. et al., 3915
Cherries (sweet) grown in Wash., 21867, 23585
Cranberries grown in Mass. et al., 12020, 20815, 25348
Dates (domestic) produced in Calif., 18188, 21463
Filberts grown in Oreg. and Wash., 49011
Grapefruit grown in Fla., 14319, 34483, 48650
Grapes (Ruby seedless) grown in Calif., 56045
Grapes (Tokay) grown in Calif., 38412
Hops of domestic production, 5841
Lemons grown in Ariz. and Calif., 38411, 57156
Lettuce grown in Tex., 49541
Limes grown in Fla., 2401, 13067, 18182, 19398
Melons grown in Tex., 50685
Milk marketing orders:
Central Arkansas, 3568, 7327, 33192, 49810
Chicago, 49310
Eastern Ohio-Western Pennsylvania, 14478, 17963, 21004, 33652
Fort Smith, Ark., 3568, 7327, 33192, 49810
Greater Kansas City, 45881, 46305, 59511
Indiana, 9155, 59390
Inland Empire, 30066
Iowa, 20818, 21915, 40028
Kentucky, 51406
Lake Mead, 2404
Lubbock-Plainview, Tex., 3568, 7327, 33192, 49810
Memphis, Tenn., 3568, 7327, 33192, 49810
Middle Atlantic, 16185, 17950, 21004, 35926, 36106, 41990
Nebraska-Western Iowa, 45881, 59511
Neosho Valley, 3568, 7327, 33192, 33253
New England, 779, 3127, 12695, 31146, 35490, 45520
New York-New Jersey, 46853, 57914
Oklahoma Metropolitan, 3568, 7327, 33192, 49810
Puget Sound, Wash., 38706
Red River Valley, 3568, 7327, 33192, 49810
Rio Grande Valley, 3568, 7327, 33192, 49810
Southern Michigan, 27195
Southwestern Idaho-Eastern Oregon, 49704, 50187, 52496
St. Louis-Ozarks, 24540, 54642, 57156, 58193
Tennessee Valley, 38412
Texas, 3568, 7327, 23725, 33192, 35047, 40030, 47534, 49810, 60573
Texas Panhandle, 3568, 7327, 33192, 49810
Upper Midwest, 14025
Wichita, Kans., 3568, 7327, 33192, 49810
Nectarines grown in Calif., 22726
Olives grown in Calif., 7228, 13584, 38706
Onions, imported; extension of time, 1098
Onions grown in Idaho and Oreg., 28816
Onions grown in Tex., 59509
Oranges, grapefruit, tangerines, and tangelos grown in Fla., 47533
Oranges and grapefruit grown in Tex., 43721, 46305, 54254
Oranges (navel) grown in Ariz. and Calif., 2401
Oranges (Valencia) grown in Ariz. and Calif., 10370, 16346
Papayas grown in Hawaii, 57259
Peaches (fresh) grown in Wash., 25347
Peaches grown in Ga., 21003, 40027
Pears, plums, and peaches (fresh) grown in Calif., 23584, 52728
Pears (Beurre D'Anjou) grown in Calif., Oreg., and Wash., 33732
Plums grown in Calif., 23724
Potato research and promotion plan:
Assesment paying, 3915
Expenses and assessment rate, 18193
Handlers, assessment responsibilities; inquiry, 45884
Potatoes grown in Idaho and Oreg., 1096, 6793
Potatoes (Irish) grown in Calif. and Oreg., 28509
Potatoes (Irish) grown in Colo., 23586, 24846, 32139, 40027
Potatoes (Irish) grown in Idaho and Oreg., 27193
Potatoes (Irish) grown in Southeastern States, 17949, 18187
Potatoes (Irish) grown in Wash., 27552, 45375
Prunes (dried) produced in Calif., 35053
Prunes (fresh) grown in Oreg. and Wash, 26026
Raisins produced from grapes grown in Calif., 6793, 14024, 22727, 30567, 33923
Tobacco inspection:
Burley, untied; experimental sales, 29129
Tomatoes grown in Fla., 49010
Tomatoes grown in Tex., 40028
Wool and mohair advertising and promotion:
ASPC-USDA agreement, 27845
Procedure, 25430

**NOTICES**

Committees; establishment, renewals, terminations, etc.:
Flue-Cured Tobacco Advisory Committee, 16357

Environmental statements; availability, etc.:
Japanese beetle, 52755
Improving Government regulations; inquiry, 21991
Meetings:
Flue-Cured Tobacco Advisory Committee, 20028, 25701, 29594
Hop Marketing Advisory Board, 60177
Plant Variety Protection Board, 54668
Nectarines, pears, plums, and peaches (fresh) grown in Calif.; referendum, 57629
Packers and stockyards; mortgage livestock sale; hearing, 54282
Packers and stockyards, posting and deposting of stockyards:
Barrett Livestock Market, Inc., Ala., et al., 24564, 49553
Cloverdale Sale Barn, Ind., et al., 57312
Cowtown Horse Auction, Calif., et al., 40895
Malvern Livestock Auction Co., Ark., et al., 40895
St. Johns Horse Auction, Mich., et al., 50488, 51823
Packers and stockyards, rates and charges:
Atkins Livestock Auction, Ark., 30084, 47988
Central Arkansas Auction Sale, Inc., 29594, 47988
Cleburne County Livestock Auction Sale, Ark., 30084, 47988
Mills Auction Market, Fla., 51434
Robertsdale Livestock Auction, Inc., Ala., 49553, 51434
Peanut Administrative Committee; 1978 crop year, expenses and rate of assessment, 26591
Peanuts; 1978 crop; incoming and outgoing quality regulations, 26591
Tobacco inspection and price support services; hearing, 42024, 59855
Warehouse and warehousemen licensed and bonded under U.S. Warehouse Act; revised list, 10712

## AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE

### RULES

Cotton; marketing quotas and acreage allotments, 2384, 8785, 48990, 54217, 56212
Crop acreage, normal, and set-aside acreage, 2819, 33676
Farms and allotments, reconstitution; marketing quotas and acreage allotments, 18159, 44820
Feed grains; disaster payments, 28431
Indemnity payment programs:
Beekeeper, 30264
Dairy, 10535
Marketing quota review committee; change in areas of venue for Flordia, 9784
Payment limitation:
Disaster payments for 1977 wheat, feed grains, upland cotton, and rice, 19340
Indian tribal farming ventures, 1929, 9784, 16968
Peanuts, marketing quotas and acreage allotments, 2817, 28987, 57581
Rice; marketing quotas and acreage allotments, 16968, 26412
Rural environmental programs, National:
Agricultural conservation program, 8784
Tobacco (burley); marketing quotas and acreage allotments, 4972, 19339, 38569
Tobacco (fire-cured, etc.); marketing quotas and acreage allotments, 4969, 6205, 16310, 19339, 28430, 43443
Tobacco (flue-cured); marketing quotas and acreage allotments, 2, 19339, 36044, 43444
Wheat; marketing quotas and acreage allotments, 28430
Wool and mohair advertising and promotion; referendum, 32125, 32127

### PROPOSED RULES

Authority delegations:
State ASC committees; program payments less than $1,000 in benefits, 4049
Cotton; marketing quotas and acreage allotments, 35053, 39117
Feed grain program (1979), 37458, 38013
Foreign investment in agricultural land, disclosure, 57236, 57607
Indemnity payment programs:
Beekeeper, 10568
Dairy, 1958
Peanuts; loan and purchase program determinations, 2404
Peanuts; marketing quotas and acreage allotments, 14025, 44863
Regulatory analysis statements, 39117
Rice; marketing quotas and acreage allotments, 5003
Rice; set-aside program and land diversion payments, 58094
Tobacco, cigar binder; 1978-79 marketing quotas, 19856
Tobacco (burley); 1979 National marketing quotas, 58093
Tobacco (fire cured, etc.); marketing quotas and acreage allotments, 59847
Tobacco (flue-cured); marketing quotas and acreage allotments, 44862
Wheat; marketing quotas and acreage allotments, 27844, 34483

### NOTICES

Authority delegations:
Financial Management Division, Director; setoffs and withholdings, 17018
Corn, grain sorghum, and barley; crop acreage and set-aside levels; 1979 feed grain program, 54280
Rural environmental programs, National:
Conservation 1979 program; policies, guidelines, and procedures; inquiry, 47224, 52507, 54966
Wheat and barley; 1978 National program acreage determinations, 56252

## AGRICULTURE DEPARTMENT

*See also Agricultural Marketing Service.*
*Agricultural Stabilization and Conservation Service.*
*Animal and Plant Health Inspection Service.*
*Commodity Credit Corporation.*
*Farmers Home Administration.*
*Federal Crop Insurance Corporation.*
*Federal Grain Inspection Service.*
*Food and Nutrition Service.*
*Food Safety and Quality Service.*
*Forest Service.*
*Packers and Stockyards Administration.*
*Rural Electrification Administration.*
*Science and Education Administration.*
*Soil Conservation Service.*

### RULES

Administrative regulations; child support or alimony payments; service of process, 6205
Agricultural commodities; sales on credit under long-term supply contracts; CFR part removed, 60859
Agricultural commodities, surplus; sales for foreign currencies; CFR subpart removed, 60858
Authority delegations by Secretary and General Officers:
Administration, Assistant Secretary; management functions, 6057, 13053, 16967
Administration, Assistant Secretary; management staff, 20781
Conservation, Research, and Education, Assistant Secretary, et al.; water pollution control contracts, 8252
Deputy Secretary, et al.; sulfonamides used in swine, 14005
Deputy Secretary et al.; Agricultural Marketing Act functions, etc., 1289
Economics, Cooperatives, and Statistics Service, Administrator; farmer cooperatives, 56637
Economics, Policy Analysis and Budget, Director, et al.; foreign investment studies, 37419
Economics, Policy Analysis and Budget, Director, et al.; remote sensing activities, 56204
Economics, Policy Analysis and Budget, Director; farmer cooperatives, 45340
Energy Office, functions, 23983
Equal Opportunity Office, Director; EEO program and discrimination complaints, 41371
Forest Service, Chief; herbicide approval, 39953
Governmental and Public Affairs Office, Director; agricultural decisions, 28979
International Affairs and Commodity Programs, Assistant Secretary, et al.; foreign travel by employees, 15135
International Cooperation and Development Office, Director; creation and functions, 31309
Rural Development, Assistant Secretary, et al.; assistance programs for American Indians, 22001
Rural Development, Assistant Secretary; functions combined with FmHA, 11689
Safety and Health Management Office, Director; establishment and consolidation of functions, 22329
Science and Education Administration; establishment, 3254
World Food and Agricultural Outlook and Situation Board; creation and delegations, 20217
Conduct standards, 43432
Export sales reporting requirements; daily releases, 5497
Freedom of Information and Privacy Act requests; fee schedule, 14002
Import quotas and fees:
Cheese; price determination, 18536, 50999
Dairy products and milk chocolate crumb; licensing system, 54902, 60427
Sugar exemption; licensing entry, 32736
Meat import limitations:
Australia, 969, 56014, 58801
New Zealand, 969, 56205, 58801

Nicaragua, 56014, 58801
Nondiscrimination:
Age discrimination prohibition, 34755
Procurement, 28492, 37455, 48491
Sales and exports under Agricultural Trade Development and Assistance Act; financing:
Selling agents, 27981
Subpoenas, investigatory; authorization of Inspector General, 12673

PROPOSED RULES
Exports under Agricultural Trade Development and Assistance Act; financing:
Ocean freight costs, 40872
Reporting requirements; commodities and U.S. flag vessel suppliers, 13385
Freedom of information and Privacy Act requests; fee schedule, 7649
Import quotas and fees:
Licensing system, 39110, 40530
Sugar exempt from fees; licensing entry, 20813
Natural gas, essential agricultural uses; inquiry, 54938
Nondiscrimination; sex discrimination prohibition in federally-assisted programs, 20012
Procurement, 24559

NOTICES
Advisory committee review; inquiry, 7992
Committees; establishment, renewals, terminations, etc.:
Equal Opportunity Citizens Advisory Committee, 42025
Export Sales Reporting Advisory Committee, 29155
Meat and Poultry Inspection Advisory Committee, 60975
National Arboretum Advisory Council, 38611
Rural Transportation Advisory Task Force; membership nominations, 53874
Cotton, upland; National acreage and voluntary reduction percentage program, 1979 crop, 59855
Feed grain donations:
Cheyenne River Sioux Indian Lands, S. Dak., 13596
Devils Lake Sioux Indian Tribe, N. Dak., 15758
Fort Berthold Indian Lands, N. Dak., 13596
Hopi Indian Tribe, Ariz., 24721
Kaibab-Paiute Indian Tribe, Ariz., 23620
Navajo Indian Tribe, Ariz., N. Mex. and Utah, 12898
Standing Rock Indian Lands, S. Dak. and N. Dak., 11729
Floodplain management and wetlands protection; procedures, 25322
Hog cholera; emergency declaration terminated, 4663
Improving Government regulations, 21986, 26091, 50988, 53164, 53233
Meat import limitations:
First quarterly estimates, 987
Second quarterly estimates, 12352
Third quarterly estimates, 28529
Fourth quarterly estimates, 44874
Meetings:
Export Sales Reporting Advisory Committee, 46355, 49554, 53050, 59408
Food and Agricultural Sciences Joint Council, 15345, 27220
Organization, functions, and authority delegations:
Assistant Secretary; foreign agriculture and agricultural stabilization and conservation functions, 51434
Economics, Statistics, and Cooperatives Service; functions and information availability, 44873
Inspector General Office personnel employed as criminal investigators; authority to administer oaths, 5556
Potato (White or Irish) production; 1978 estimate, 39596
Privacy Act; systems of records, 4080, 7137, 22227, 28019, 28020, 35085, 60628
Privacy Act; systems of records; annual publication, 51268
Regulatory agenda; semiannual, 53164, 53233
Sugar import restrictions; inquiry, 26601, 29972
Wheat; 1979 National acreage and set-aside program determinations, 36665

## AIR FORCE DEPARTMENT

RULES
Air Force Reserve Officer's Training Corps; delay in active duty for graduates, 36924
Aircraft leased for air shows; USAF responsibilities, 54625
Animals in DOD research and training, 39101
Appointment of officers, 35688
Audiovisual documentation; sale or release, 33241
Audiovisual documentation program, 33907
Certificates of separation, lost or destroyed; issuing certificates in lieu of, 38386
Civil Air Patrol:
Employment, 51764, 59486
Support, 51765
Claims, administrative; authority delegations, etc., 7316
Desertion and unauthorized absenteeism; policies and procedures, 38388
Discharge Review Board, 20795
Enlistment, 36071
Information audiovisual (AV) activities, 37687
Military personnel:
Medical, dental and veterinary care from civilian sources; ambulance control at Lackland AFB, Tex., 6766
Organizational and representational activities, 4605
Separation documents and procedures, 10908
Non-governmental test and evaluation, support, 22030
Officer Training School (OTS), 39089
Personal commercial affairs, 58088
Personnel Review Boards:
Correction of Military Records Board; procedures clarification, 1619
Discharge Review Board; index inquiry address, 2394
Privacy Act; implementation, 19230
Public relations:
Non-Government groups, information activities, 35478, 42249
Recreation:
Aero clubs; redesignated, 1070
Recreational activities and service program; redesignated, 1070
Riding stables, 6767, 16979
Simplification of regulations, 22970
Special investigations office:
Information handling and release, 33908
Oaths, authority to administer, 32411
Violations of public trust, 33912

PROPOSED RULES
Civil Air Patrol:
Employment, 2735
Support, 980
Non-governmental test and evaluation, support, 16193
Privacy Act; implementation, 6813

NOTICES
Air Force Departmental Headquarters; negative determination for proposed realignment/reduction, 15767
Committees; establishment, renewals, terminations, etc.:
Air University Board of Visitors, 2750
Environmental statements; availability, etc.:
Advanced tanker/cargo aircraft, procurement, 46064
Chanute AFB, Ill.; proposed closure, 46063
Gallant Eagle 79; joint readiness exercise, 26606, 30330
Goodfellow AFB, Tex.; proposed closure, 38069
Grand Forks AFB, N. Dak.; family housing, 49347
KI Sawyer Air Force Base, Mich.; family housing, 49348
Kingsley Field AFB, proposed inactivation of units, 37738
Missile-X system; hearing, 35524
Mobile Land-Based Intercontinental Ballistic Missile System, 25711
PAVE PAWS radar systems, Otis AFB, Mass., and Beale AFB, Calif.; ballistic missiles tracking and detection, 26606
Rickenbacker AFB, Ohio; proposed reduction, 37739
Space transportation system; inertial upper stage segment, 59419
Meetings:
Academy Board of Visitors, 45425, 51699
Air University Board of Visitors, 1117, 17857, 45425, 45912
Community College Advisory Committee, 8284, 45425, 50013
Historical Program Advisory Committee, 45425
Military Airlift Committee, 14350
Scientific Advisory Board, 786, 2652, 2750, 3422, 4452, 8285, 8831, 9194, 10718, 12059, 12905, 13421, 14350, 14713, 16215, 17995, 18232, 20260, 21347, 21925, 21926, 22435, 23754, 24568, 26606, 27229, 27230, 30330, 32163, 32450, 36504, 40544, 43345, 43760, 44562, 45425, 45913, 50490, 52275, 52276, 52759, 53493, 54123, 54679, 55276, 57642, 58111, 59420, 59869
Privacy Act; systems of records, 16894, 25170, 46063, 50286

## AIR QUALITY NATIONAL COMMISSION

NOTICES
Hearings, 59555

## AIRCRAFT, AIR CARRIERS, AIRPORTS

*See Air Force Department.*

*Civil Aeronautics Board.*
*Federal Aviation Administration.*
*National Transportation Safety Board.*

## ALCOHOL, DRUG ABUSE, AND MENTAL HEALTH ADMINISTRATION

**NOTICES**

Advisory committees; filing of annual reports, 1131
Alcohol grant allotments formula; FY 1978, 24596
Committees; establishment, renewals, terminations, etc.:
  Advisory committees; continuance list, 5068, 41438
  Mental Health Services Research Review Committee, 32187
  Rape Prevention and Control Advisory Committee, 35550
Confidentiality authorization:
  Boston University School of Medicine, 11264
  Harvard Community Health Plan, 31237
  New York State Office of Drug Abuse Services and Narcotic and Drug Research, Inc., 21050
  New York State Psychiatric Institute, 20555
  Research Foundation for Mental Hygiene, Inc., 61006
  Research Triangle Institute, 8851, 11264
  Southern Methodist University employees, 52773
  University of California, 37219
Meetings:
  Advisory Committees; January, 2444
  Advisory Committees; February, 2938, 4115, 5068
  Advisory Committees; March, 4679, 5890, 7026, 7269, 9654, 9861
  Advisory Committees; April, 7026, 9860, 14735
  Advisory Committees; May, 13630, 15194, 15776, 18256, 19922, 21726
  Advisory Committees; June, 18252, 18255, 18768, 18769
  Advisory Committees; July, 25191
  Advisory Committees; August, 27236, 29989, 32874
  Advisory Committees; September, 33821, 35549, 36691, 37012, 38626
  Advisory Committees; October, 38624, 41087, 41088, 46375
  Advisory Committees; November, 47789, 48717, 48718
  Advisory Committees; December, 51726, 52061, 55464, 57194, 58231
  Advisory Committees; January (1979), 55464, 58231, 59136
Methadone; relationship between Federal narcotic treatment programs and State authorities, 6939
Rape Prevention and Control Advisory Committee; report availability, 17540

## ALCOHOL, TOBACCO AND FIREARMS BUREAU

**RULES**

Cigars, cigarettes, and cigarette papers and tubes:
  Exportation evidence requirements, 59287
Denatured alcohol and rum, distribution and use:
  Redenaturation of recovered spirits without supervision, 58369
Distilled spirits, wines, and beer importation:
  Record retention; time period increase, 20495, 37180
Distilled spirits exports, etc.; implementation of statutory changes, 24234, 29000
Freedom of information; procedural rules, 10687, 14650
Fruit-flavored concentrates, volatile, production:
  Record retention; time period increase, 20493, 37180
Liquor dealers:
  Record retention; time period increase, 20494, 37180
Liquors and articles from Puerto Rico and Virgin Islands:
  Record retention; time period increase, 20494, 37180
Procedural rules, 10687
Reorganization; title and definition changes, editorial changes, etc., 13532
Wine labeling and advertising:
  Definitions; appellation of origin, grape type designations, etc., 37675, 54625
  Fill standards, 19848

**PROPOSED RULES**

Beverages, alcoholic; warning labels; inquiry, 2186
Distilled spirit plants:
  Containers, strip stamps and other devices, uses, 51808
Distilled spirits:
  Containers, strip stamps and other devices, uses, 51808
Distilled spirits, wines, and beer importation:
  Containers, strip stamps and other devices, uses, 51808
  Record retention; time period increase, 3137
Distilled spirits labeling and advertising:
  Advertising practices; advance notice, 54266
Firearms:
  Importation, transportation, etc., 11803, 21901
Firearms and ammunition, commerce in:
  Importation, transportation, etc., 11803, 21901
  Reporting of firearms manufactured, stolen or recovered, etc.; extension of time, 21901
  Unique serial numbers, 11800
Fruit-flavored concentrates, volatile, production:
  Record retention; time period increase, 3137
Inducements furnished to retailers; unlawful trade practices; inquiry; extension of time, 8271
Liquor dealers:
  Containers, strip stamps and other devices, uses, 51808
  Record retention; time period increase, 3137
Liquor exportation:
  Containers, strip stamps and other devices, uses, 51808
Liquors; unlawful trade practices; inquiry; extension of time, 8271
Liquors and articles from Puerto Rico and Virgin Islands:
  Containers, strip stamps and other devices, uses, 51808
  Record retention; time period increase, 3137
Machine guns, destructive devices, etc.:
  Importation, transportation, etc.; extension of time, 21901
  Reporting of firearms manufactured, stolen or recovered, etc., 11800, 21901
  Unique serial numbers, 11803
Malt beverages labeling and advertising:
  Advertising practices; advance notice, 54266
Wine labeling and advertising:
  Advertising practices; advance notice, 54266

**NOTICES**

Advisory committees, closed meetings, reports availability, 2785
Authority delegations:
  Assistant Director, Regulatory Enforcement; activities at breweries and pilot brewing plants, 56745
  Assistant Director, Regulatory Enforcement; ATF tax claims, 40971, 41449
  Assistant Director, Regulatory Enforcement; basic permit requirements, 59577
  Assistant Director, Regulatory Enforcement; distilled spirits, 26174
  Assistant Director, Regulatory Enforcement; distilled spirits in nonbeverage products, 10458, 12143
  Assistant Director, Regulatory Enforcement; distilled spirits plants, 7387
  Assistant Director, Regulatory Enforcement; distribution and use of denatured alcohol and rum, 30955
  Assistant Director, Regulatory Enforcement; distribution and use of tax-free alcohol, 26174, 38150
  Assistant Director, Regulatory Enforcement; exportation of liquors, 11638
  Assistant Director, Regulatory Enforcement; formulas for denatured alcohol and rum, 27271, 38149
  Assistant Director, Regulatory Enforcement; importation of distilled spirits, wines, and beer, 24932
  Assistant Director, Regulatory Enforcement; liquor regulations, 20592
  Assistant Director; Regulatory Enforcement; returns of substances, articles, or containers, 39882
  Assistant Director, Regulatory Enforcement; stills and condensers, 33860
  Assistant Director, Regulatory Enforcement; taxpaid wine bottling houses, 45487
  Assistant Director, Regulatory Enforcement; vinegar production by vaporizing process, 58692
  Assistant Director Regulatory Enforcement; production of volatile fruit-flavor concentrates, 42327
  Regional Regulatory Administrators et al.; acceptance or rejection of offers in compromise, 55305
  Regional Regulatory Administrators et al.; use of seal, 30955
Explosives, commerce in; list of explosive materials, 32492
Firearms, granting of relief, 5605, 11779, 16843, 25755, 40094, 43790, 51736

Gun control; published firearms laws of political subdivisions and States, 23202
Meetings:
Coastal Engineering Research Board, 14713
Explosives Tagging Advisory Committee, 2968, 26626, 43790, 49085
Privacy Act; systems of records, 14713

## ALIENS

*See Immigration and Naturalization Service.*

## AMERICAN BATTLE MONUMENTS COMMISSION

### NOTICES

Improving Government regulations, 22602, 51693

## ANIMAL AND PLANT HEALTH INSPECTION SERVICE

### RULES

Animal and poultry import restrictions:
African swine fever; pork and pork products from Dominican Republic, 30269
African swine fever; pork and pork products from Haiti, 46517
African swine fever; pork and pork products from Italy, 15613
African swine fever; pork and pork products from Malta, 21641
Birds; quarantine costs, 35459, 35683, 44860, 53707
Cattle from Canada, 28454
Equine piroplasmosis optional pre-entry diagnostic screening tests deleted, etc., 15138
Garbage; storage and movement, etc., 39956
Harry S. Truman Animal Import Center; quarantine space allotments, lottery applications, 11690
Horses affected with CEM; return to U.S., 27173
Horses affected with CEM from Belgium and West Germany, 56877
Horses from countries affected with CEM; deletion of temporary import provisions, 38571
Horses from countries affected with CEM; unrestricted import, 25418
Rinderpest and foot-and-mouth disease, 4594
Rinderpest and foot-and-mouth disease, etc.; change in disease status of Brazil, 27173
Rinderpest and foot-in-mouth disease, etc.; change in disease status of Denmark, 43017
Animal exports:
Attendants of exported livestock, 27171
Deputy Administrator; authorization to permit exportation of animals not covered by provisions, 27171
Export inspection facilities; standards approval; enforcement policy, 39080
Animal welfare:
Transportation, handling, care, and treatment of warm-blooded animals; standards, 21161, 56215
Communicable diseases in horses, asses, mules and zebras:
Contagious equine metritis (CEM), 22926
Livestock and poultry disease control:
Brucellosis, 33678
Indemnity payments; sheep or goats destroyed because of scrapie, 41184
Livestock and poultry quarantine:
Brucellosis, 4592, 8787, 11144, 12308, 13495, 19348, 23988, 27168, 36049, 47169, 50160, 56218, 60865
Contagious equine metritis (CEM), 14023, 25993
Scabies in cattle, 1063, 4591, 5796, 10544, 35020, 44858, 52466, 56876
Texas (splenetic) fever in cattle, 3700, 60864
Tuberculosis, 34431
Overtime services relating to imports and exports:
Animals, commuted traveltime allowances, 19351
Birds; quarantine costs, 53707
Border ports, seaports, and airports, 50671
Commuted traveltime allowances, 50672
Plants, commuted traveltime allowances, 12301, 34429
Veterinary Services inspectors; laboratories, border ports, ocean ports and airports, 52466
Plant pest administrative procedural manuals; incorporation by reference, 26412
Plant pest regulations:
Garbage, handling and storage, diseased animals, 39954
Plant quarantine, domestic:
Fire ant, imported, 1925
Gypsy and browntail moth; hazardous mobile home parks and recreational sites, list, 31311, 36043
Japanese beetle, 3732, 16984, 40528
Mexican fruit fly, 15607
Pink bollworm, 25135
Surgarcane smut, 54919
Witchweed, 28979
Plant quarantine, foreign:
Oranges, Unshu, 13491
Viruses, serums, toxins, etc.:
Autogenous bacterin; reduction of submitted samples, 13498
Biological products, potency standard; expiration date extension for serials or subserials, 1479
Biological products, testing terminology, 3701
Chicken inoculation test for pathogens, 7610
Exportation of unlabeled final containers of liquid biological products and desiccated products, 11145
Feline panleukopenia vaccine, etc.; minimum virus titer changes, 25078
Master seed virus; extraneous viruses detection; test requirements, 11146, 49528
Salmonella choleraesuis bacterin and salmonella dublin bacterin, 25077
Serum-neutralization tests use authorization, 41186, 50162
Tetanus antitoxin; shorter expiration date, 1479

### PROPOSED RULES

Animal and poultry import restrictions:
Bird identification, 16346
Birds; veterinary services; recovery of costs, 38585
Cattle exposed to splenetic, southern or tick fever from Mexico; advance notice, 60932
Cattle from Canada, 1506
Garbage; storage and movement, etc., 28516
Horses, 33926, 34490, 40037
Horses from countries affected with CEM, 6957, 14042
Rinderpest and foot-and-mouth disease; milk and milk products, 1962, 6234
Animal welfare:
Horse protection regulations, 18514, 24064
Transportation, handling, care, and treatment of animals; standards, 47964
Transportation, handling, care, and treatment of marine mammals; standards, 42200
Livestock and poultry disease control:
Brucellosis, 19402
Indemnities payment; sheep or goats destroyed because of scrapie, 11205
Livestock and poultry quarantine:
Pseudorabies, 22044, 25433
Overtime services relating to imports and exports:
Animals, overtime work at border ports, seaports, and airports, 10571
Plant pest regulations:
Garbage, handling and storage, diseased animals, 28507
Quarantine notices, domestic:
Fire ant, imported, 54936
Viruses, serums, toxins, etc.:
Avian pox vaccine safety test, 49013
Feline calicivirus and rhinotracheitis vaccines, etc.; purity requirements, etc., 20506
Feline panleukopenia, etc.; minimum virus titer changes, 14042
Leptospira bacterin standards; challenge dose titer range, increase, 49012
Master seed virus; extraneous viruses detection; test requirements; update, 17477
Salmonella choleraesuis bacterin and salmonella dublin bacterin, 6958
Serum-neutralization tests use authorization, 15719
Viricidal activity test; revision, 49542

### NOTICES

Animal Import Center, Flemming Key, Fla.; name changed to Harry S. Truman Animal Import Center, 11727
Animal welfare; lists:
Dealers, licensed, 10054
Exhibitors, licensed, 9412
Exhibitors, registered, 9442
Research facilities, registered, 10
Environmental statements; availability, etc.:
Japanese beetle, 17515, 21709, 26089
New York Animal Import Center, N.Y., 11244
Hog cholera; emergency declaration terminated, 4663
Import permit applications; cattle from countries with foot-and-mouth disease, 11727
Improving Government regulations; inquiry, 21990
Meetings:
Foreign Animal Diseases Advisory Committee, 24564
Japanese beetle quarantine and control program, 3732, 5020
Swine brucellosis, 12898

Soil samples; approved laboratories, list, 6974
Stockyards, livestock markets, and slaughtering establishments, certain; specific approvals, 4650, 22753, 26088, 56928

## ANIMALS

*See Animal and Plant Health Inspection Service.*
*Fish and Wildlife Service.*
*Food and Drug Administration.*
*National Oceanic and Atmospheric Administration.*
*Packers and Stockyards Administration.*

## ANTITRUST DIVISION

**NOTICES**

Competitive impact statements and proposed consent judgments; U.S. versus listed companies:
Allied Maintenance Corp. et al., 46384
American Service Corp. et al., 37497
Arrow Overall Supply Co. et al., 21062
Atlanta News Agency, Inc., et al.; extension of time, 5079
Bechtel Corporation, et al., 12953
Bristol-Myers Co. et al., 51454
California & Hawaiian Sugar Co. et al., 27252, 32472
CIBA Corp. et al., 11762
Clovis Retail Liquor Dealers Trade Association et al., 1846
Coca-Cola Bottling Co. of Los Angeles et al., 28858
Culbro Corp. et al., 14157, 28568
Enderle Metal Products Co. et al., 51857
Everest & Jennings International et al., 21740, 52778
Federated Department Stores, Inc., et al., 9659
Fremont Bank, 39865
Golden Gate Sportfisher's, Inc., 56289
Guild Savings & Loan Association, 25744
Hawaiian Holidays Tours, Inc., et al., 42822
Holsum Bakery, Inc., et al., 18056
Ideal Baking Co. of Paris, Inc., et al., 14162
Inter-Island Travel Service, Ltd., et al., 26801
Kliegman Bros., Inc., et al., 39190
Leggett & Platt, Inc., 5594, 5598, 22790
Lubbock County Beverage Association et al., 3180
Motor Carriers Tariff Bureau, Inc., 30134
New York Coffee and Sugar Exchange, Inc., 60342
Nu-Phonics, Inc., et al., 61029
Owensboro River Sand & Gravel Co., Inc., et al., 52298
Pittsburgh Area Pontiac Dealers, Inc., 10641
Smith's Bakers Inc. et al., 10736
Whittenberg Engineering & Construction Co. et al., 36146, 51860
Wholesale Tobacco Distributors of New York Inc. et al., 60346

## ANTITRUST LAWS AND PROCEDURES, NATIONAL COMMISSION FOR REVIEW

**NOTICES**

Hearings, 26351, 29192, 31474, 38953, 39868, 44573
Meetings, 24635, 28867, 34563, 40324, 43079, 50974, 53512, 54705, 56107, 57357
Written statements to the Commission; closing date, 50511, 54705

## ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

**NOTICES**

Awareness seminars; planning and arrangement; inquiry, 28219
Compliance systems services; solicitation, 34828
Meetings:
Accessible Environment National Advisory Committee, 3602, 16357, 28219, 40543

## ARMED FORCES

*See Air Force Department.*
*Arms Control and Disarmament Agency.*
*Army Department.*
*Civil Aeronautics Board.*
*Defense Civil Preparedness Agency.*
*Defense Communications Agency.*
*Defense Contract Audit Agency.*
*Defense Department.*
*Defense Intelligence Agency.*
*Defense Investigative Service.*
*Defense Logistics Agency.*
*Defense Nuclear Agency.*
*Navy Department.*
*Selective Service System.*

## ARMS CONTROL AND DISARMAMENT AGENCY

**RULES**

Organization and functions, 13508

**PROPOSED RULES**

Privacy Act; implementation, 17003, 26589

**NOTICES**

Advisory Committee closed meetings; report availability, 15380
Environmental assessment, Environmental Modification Convention; availability, 15380
Meetings:
General Advisory Committee, 6865, 11838, 15380, 20522, 26602, 38449, 46059, 49555, 55269, 60177
Nuclear non-proliferation; establishment of procedures, 25326
Privacy Act; systems of records, 17020, 26602, 50953

## ARMY DEPARTMENT

*See also Engineers Corps.*

**RULES**

Environmental quality:
Installations, off-road vehicles; use on Army land; correction, 1792
Investigations; procedures for officers and boards of officers, 14458
Military reservations:
Army training areas in Hawaii; entry regulations, 46972
National Cemetery, Arlington:
Bicycle restrictions, 56661
Eligibility for inurnment of cremated remains, 35043, 35922
Personnel review boards:
Discharge Review Board; procedures and standards, 15572, 40498
Privacy Act; implementation, 1336, 17821, 38823
Real estate, military; leasing, 29748, 59060
Real property:
Relocation assistance and real property acquisition policies, 41974
Relocation assistance and real property acquisition policies; annual relocation assistance reports to GSA, elimination, 22356
Simplification of regulations, 26443

**PROPOSED RULES**

Military reservations:
Army training areas in Hawaii; entry regulations, 33749
Real property acquisition, 59328
National Cemetery, Arlington:
Bicycle restrictions, 30075, 35069, 35950
Parking restrictions, 3139
Privacy Act; implementation, 27864, 59852
Reserve officers' training corps:
Senior ROTC program; organization, administration, and training, 59519
Schools and colleges:
ROTC, Junior Program and National Defense Cadet Corps; organization, administration, operation, and support, 58832

**NOTICES**

Committees; establishment, renewals, terminations, etc.:
Armed Forces Epidemiological Board, 45426
Chief of Engineers Environmental Advisory Board, 45427
Coastal Engineering Research Board, 45428
Command and General Staff College Advisory Committee, 45427
Historical Advisory Committee, 2425, 45427
Judge Advocate General's School, Board of Visitors, 45426
Medical Research and Development Advisory Panel, 45428
Pathology Institute Scientific Advisory Board, 45427
Promotion of Rifle Practice, National Board, 45427
ROTC Affairs Advisory Panel, 45426
Science Board, 45426
Scientific Advisory Board, 7999
Shoreline Erosion Advisory Panel, 35091
U. S. Military Academy, Board of Visitors, 45426
Winter Navigation Board, 45428
Discharge Review Boards; index modification, 47237
Environmental statements; availability, etc.:
Dugway Proving Ground, Utah, 12747, 52512
Fort Belvoir, Va., STURGIS nuclear power barge, 1817
Fort Bliss, Texas, 52276
Fort Ord, Calif., 19701
Fort Polk, La., 27881
Fort Riley, Kans., 53493
Fort Stewart and Hunter Army Airfield, Ga., 18602
Generating station, Louisa and Muscatine Counties, Iowa, 54123
National Training Center, Fort Irwin Site, 43059
Port Ontario, New York; harbor refuge, 56087

Rocky Mountain Arsenal, Colo., 26104, 45429
Second Infantry Division redeploying from Korea; hearings, 14983
Snake River Watershed Project; Marshall, Polk, and Pennington Counties, Minn., 54124
Tooele Army Depot, Utah, 21714, 38071
Fort MacArthur, Calif.; preferred realignment alternative, 14983
Fort Riley, Kans., preferred alternative; Second Infantry Division redeploying from Korea; inquiry, 44877
Meetings:
Armed Forces Epidemiological Board, 12360, 24117, 25855, 59116
Armed Forces Institute of Pathology's Scientific Advisory Board, 21347
Army Science Board, 6305, 30611
Board of Visitors, U.S. Military Academy, 8173, 29600, 40272
Chemical Systems Laboratory Human Use Committee, 2917
Coastal Engineering Research Board, 45429
Command and General Staff College Advisory Committee, 59116
Environmental Advisory Board, 9634
Great Lakes-St. Lawrence Seaway, Winter Navigation Board, 13913, 24118
Historical Advisory Committee, 8173
Judge Advocate General's School, Board of Visitors, 8577
Military personal property symposium, 18602, 22067, 37210, 54123, 57330
Promotion of Rifle Practice, National Board, 5035, 14983, 24117, 49349, 58851
ROTC Affairs Advisory Panel, 22067, 54123
Science Board, 45428, 45429, 46999, 52512, 52759, 54123, 54679, 55436
Science Board Standing Committee, 37209
Shoreline Erosion Advisory Panel, 5559, 35375
U.S. Military Academy's Concept for Furthering Cadet Morale Development, Workshop for Evaluating, 13090
Winter Navigation Board, 31428, 46562, 49557, 60185
Military Academy, cadet morale development; workshop for evaluating; meeting, 13090
Personal property moving and storage; symposium, 18602, 22067, 37210, 54123, 57330
Privacy Act; systems of records, 3151, 15353, 26606, 27882, 30594, 34520, 38070, 40272, 42026, 43059, 47604, 48894, 49557, 52512, 58111, 59116, 59539, 59869

## ARTS AND HUMANITIES, NATIONAL FOUNDATION

**PROPOSED RULES**
Nondiscrimination:
Handicapped in federally-assisted programs, 15458, 15737, 26589
**NOTICES**
Advisory committees; information and activities, public disclosure, 50274
Advisory panel review; inquiry, 11619
Committees; establishment, renewals, terminations, etc.:
Arts and Artifacts Indemnity Panel Advisory Committee, 17413
Humanities National Council Advisory Committee, 14366
Humanities Panel Advisory Committee, 11774
Improving Government regulations, 22591, 50974, 51728
Meetings:
Architecture, Planning, and Design Advisory Panels, 34563, 39868, 46390, 49860
Architecture and Environmental Arts Advisory Panel, 6344, 9541
Artists-in-Schools Advisory Panel, 1016, 12769, 53868
Arts and Artifacts Indemnity Panel, 17558, 53069
Arts National Council, 3632, 17875, 20570, 24386, 32902, 53069
Dance Advisory Panel, 8042, 21954, 28260, 40325, 53868, 57357
Education Programs Panel Advisory Committee, 6177
Expansion Arts Advisory Panel, 7071, 21954, 40940, 52303
Federal Graphics Evaluation Advisory Panel, 17558, 50273, 57358
Federal-State Partnership Advisory Panel, 8042, 16819, 20570, 25209, 39868, 59182
Folk Arts Advisory Panel, 53868
Humanities National Council Advisory Committee, 5442, 17558, 33352, 50974
Humanities Panel, 15808, 18800, 18801, 21382, 21383, 25501, 25502, 27263, 27617, 30374, 30375, 30376, 30937, 31996, 33352, 35132, 35133, 38953, 38954, 40325, 40577, 43590, 43591, 44944, 46608, 50326, 53512, 55018, 57197, 58126, 58127, 59556, 59932, 61051
Literature Advisory Panel, 3955, 21748, 48087
Media Arts Advisory Panel, 1563, 3632, 8042, 11619, 16819, 22795, 32902, 34563, 43397, 50274, 52303, 53869, 58875
Museum Advisory Panel, 8042, 22796, 39868, 59932, 60676
Music Advisory Panel, 6344, 15020, 17875, 24386, 31246, 41314, 44574, 48087, 49592, 50062, 50274, 53869, 57358, 61052
Opera/Musical Theatre Panel, 58875
Planning Office Panel, 14365
Planning Office Panel Advisory Committee, 1850
Public Programs Panel Advisory Committee, 6177, 6178, 10983, 11774, 11775
Research Grants Panel, 3183, 3184, 10984, 11775, 14365
Special Projects Advisory Committee, 10748, 21955, 54705
Special Projects Advisory Panel, 8596, 24386, 34563
Theatre Advisory Panel, 10984, 25389
Visual Arts Advisory Panel, 2464, 4698, 4890, 7071, 8043, 8597, 9541, 9889, 29633, 42049, 50274, 53069, 53869
Meetings; Sunshine Act, 25405
Regulatory agenda; semiannual, 50974, 51728

## AUTOMOTIVE AGREEMENT ADJUSTMENT ASSISTANCE BOARD

**RULES**
CFR Chapter removed, 53426

## BALANCED NATIONAL GROWTH AND ECONOMIC DEVELOPMENT, WHITE HOUSE CONFERENCE

**NOTICES**
Meetings, 7998, 9914, 13121
Advisory Committee, 20593

## BANKS, BANKING

*See Comptroller of Currency.*
*Export-Import Bank.*
*Farm Credit Administration.*
*Farmers Home Administration.*
*Federal Deposit Insurance Corporation.*
*Federal Home Loan Bank Board.*
*Federal Reserve System.*
*National Credit Union Administration.*

## BENEFITS REVIEW BOARD, LABOR DEPARTMENT

**RULES**
Establishment, operation, and practice and procedure rules, 42145

## BIOLOGICAL PRODUCTS

*See Animal and Plant Health Inspection Service.*
*Food and Drug Administration.*

## BLIND AND OTHER SEVERELY HANDICAPPED, COMMITTEE FOR PURCHASE FROM

**RULES**
Procurement, 28496
**PROPOSED RULES**
Procurement, 45413
**NOTICES**
Improving Government regulations, 27229, 56256, 59868
Privacy Act; systems of records; annual publication, 43639
Procurement list, 1978; additions and deletions, 1116, 1117, 1980, 2916, 3739, 4670, 5860, 5861, 6992, 8828, 8829, 9842, 11247, 11248, 12360, 13605, 14711, 15767, 17027, 19430, 19431, 20533, 21713, 21714, 22770, 22771, 24117, 25170, 26103, 27229, 28532, 30329, 31427, 32850, 34519, 35520, 35743, 35744, 36676, 39167, 40051, 41255, 43058, 44877, 46362, 47235, 47236, 49035, 50236, 51445, 52510, 52511, 57941
Procurement list, 1979; additions and deletions, 53152, 55274, 57638, 57639, 58609, 59868, 60987
Regulatory agenda; semiannual, 56256

## BONNEVILLE POWER ADMINISTRATION

**NOTICES**
Electric energy allocation; formula development; inquiry, 3611
Energy conservation policy; inquiry, 13092, 16215
Environmental statements, availability, etc.:
Bonneville proposed program for 1979 FY, 26462
Bonneville proposed program for 1979 FY; Franklin Area system, 38892
Bonneville proposed program for 1980 FY, 25839, 45432, 47243

Wholesale electric rate increase, 13607
Wholesale electric rate increase; 1979 proposal, 38356
Meetings:
Franklin Area System Reinforcement, 41075
Rates, wholesale power; inquiry, 38356
Rates, wholesale power; 1978 filing intent, 2659

## BRIDGES

*See Coast Guard.*
*Federal Highway Administration.*

## CANADA AND UNITED STATES-INTERNATIONAL JOINT COMMISSION

NOTICES
Great Lakes, pollution by land use activities; hearings, 49371
Great Lakes; water quality objectives; hearing, 30903
Lake Champlain and Upper Richelieu River; regulation of; hearings, 16553, 35398
Lake Superior; regulation of; hearings, 54144, 59140
Osoyoos Lake and Okanogan River; water level improvement; hearings, 37772
St. Marys River; redevelopment of hydroelectric generating facilities; hearings, 17409, 21061, 35560

## CANAL ZONE

*See Panama Canal.*

## CENSUS BUREAU

RULES
Foreign trade statistics:
Reporting requirements, miscellaneous amendments, 56031
Used vehicles, exports; shipper's export declaration, 50675, 60145
Population censuses, special:
Fee structure for city block statistics; 1980 census, 3903, 59835

PROPOSED RULES
Foreign trade statistics:
Used vehicles, exports; shipper's export declaration, 7650
Population and per capita income estimates; challenge procedure, 50696, 51806

NOTICES
Committees; establishment, renewals, terminations, etc.:
Agriculture Statistics Census Advisory Committee, 59534
American Economic Association Census Advisory Committee, 59534
American Marketing Association Census Advisory Committee, 59535
American Statistical Association Census Advisory Committee, 59535
Housing for 1980 Census Advisory Committee, 1113
Population Statistics Census Advisory Committee, 59535
Improving Government regulations; inquiry, 23175
Meetings:
Agriculture Statistics Census Advisory Committee, 10953, 43749
American Economic Association Census Advisory Committee, 11840, 42776
American Marketing Association Census Advisory Committee, 15349, 46562
American Statistical Association Census Advisory Committee, 4447, 36501
Asian and Pacific Americans Population for 1980 Census Advisory Committee, 3924, 49343
Black Population for 1980 Census Advisory Committee, 7679, 45423
Housing for 1980 Census Advisory Committee, 2423
Population Statistics Census Advisory Committee, 8576, 41070
Spanish Origin Population for 1980 Census Advisory Committee, 1979, 31190, 54283
Population censuses, special; results, 1979, 5404, 9328, 14336, 18598, 24722, 30089, 34829, 39847, 46360, 52273, 57172
Population censuses, special; 1977 voting age population estimates, 10715, 13086
Surveys, determinations, etc.:
Canned foods; distributors' stocks, 46562, 53052
Company organization survey, 32845, 40048
Manufacturing areas; annual, 52042, 58212
Registration and voting statistics collection, 11841, 41070
Retail sales, purchases, and inventories, 3924, 53051, 56086
Wholesale trade; annual, 51825, 59115

## CENTER FOR DISEASE CONTROL

*See Disease Control Center.*

## CENTRAL INTELLIGENCE AGENCY

RULES
Freedom of information, 24527

NOTICES
Privacy Act; systems of records; annual publication, 45956

## CHILD, INTERAGENCY COMMITTEE FOR INTERNATIONAL YEAR OF

NOTICES
Child health record card; development of a portable cumulative, 55470

## CHILD, INTERNATIONAL YEAR OF THE, 1979, NATIONAL COMMISSION

RULES
Privacy Act; implementation, 30035

PROPOSED RULES
Privacy Act; implementation, 23583

NOTICES
Meetings, 26503, 31245, 40082, 53511
Privacy Act; systems of records, 23660, 30145

## CHILD DEVELOPMENT OFFICE

*See Human Development Services Office.*

## CHILD SUPPORT ENFORCEMENT OFFICE

RULES
Child support enforcement program; good cause for refusal to cooperate; program instruction, 15425
Federal financial participation:
Availability and rate, 29787
Cooperative agreements with courts and law enforcement officials, costs, 33250
State plan requirements:
Federal parent locator service; information requests, 33248
Good cause for refusal to cooperate, 45752
Program operation; location of absent parents, 33249

PROPOSED RULES
Child support enforcement program; good cause for refusal to cooperate; hearing, 15457
Federal financial participation:
Medical support, 38668
Procedural rules, 38337
Medical support enforcement, 38668
Public assistance programs:
Grants to States, policies and procedures; recodification decision, 7672
State plan requirements:
Bonding of employees and handling of cash receipts, 14323
Child support collections treatment and distribution, organizational units, eligibility, etc.; advance notice, 34164
Good cause for refusal to cooperate; hearing, 15457
Medical support, 38668
Procedural rules, 38337

NOTICES
Authority delegations:
Deputy Director and Regional Representatives; enforcement program authorities, 20866

## CHILDREN, CHILD PROTECTION

*See ACTION.*
*Child, Interagency Committee for International Year of.*
*Child, International Year of the, 1979, National Commission.*
*Child Support Enforcement Office.*
*Education Office.*
*Food and Nutrition Service.*
*Human Development Services Office.*
*Social Security Administration.*

## CIVIL AERONAUTICS BOARD

RULES
Accounts, records, and memoranda for air carriers, preservation:
Air carriers, all-cargo; applicability, 53649
Public charters; editorial changes, 36602
Accounts and reports for certificated air carriers; uniform system:
Air carriers, all-cargo, 53647
Public charters; editorial changes, 36602
Route air carrier reporting entities, 40453
Troubled debt restructurings, prior period adjustments, and forward exchange contracts, 46294
Air carriers, all-cargo; general rules, 53635

Air freight forwarders, cooperative shippers associations, etc.:
Operating authority, liberalized, 13504
Air taxi operators, classification and exemption:
Alaska and Hawaii, all-cargo operations, aircraft size increase, 41192
All-cargo air taxis, increased size, 25090
Dual operating authority, 1490
Air transportation, supplemental; public charters; editorial changes, 36599
All-cargo services, scheduled; reporting results; CFR Part removed, 53649
Automatic market entry procedures, 60435
Board proceedings:
Air carrier associations participation, 60870
Public participation, compensation, 56882
Certificates of public convenience and necessity:
Inauguration and temporary suspension of scheduled route; editorial change, 34116
Certificates of scheduled route service:
Editorial change, 34115
Charters:
Advance booking; more than one origination or destination point, 2387
Advance booking; reporting requirements, approval by Comptroller General, 3087
Advanced booking; replaced by public charters; CFR Part removed, 36603
Emergency commercial charters; reporting requirements, approval by Comptroller General, 3086
Foreign air carrier charters; reporting data; public charters; editorial change, 36602
Foreign air carrier permits, conditions and limitations; reporting requirements, approval by Comptroller General, 3087
Foreign air carriers; public charters; editorial change, 36600
Foreign air carriers; reporting requirements, approval by Comptroller General, 3087
Foreign air carriers; staff functions transfers; editorial change, 34116
Foreign air carriers permits; conditions and limitations; editorial changes, 34117
Foreign air carriers permits authorizing charter transportation; public charters; editorial change, 36601
Inclusive tours; more than one origination or destination point, 2387
Inclusive tours; replaced by public charters; CFR Part removed, 36604
Inclusive tours; reporting requirements, approval by Comptroller General, 3088
One-stop inclusive tours; more than one origination or destination point, 2387
One-stop inclusive tours; reporting requirements, approval by Comptroller General, 3088
One-stop-inclusive tours; replaced by public charters; CFR Part removed, 36604
Public; establishment, 36611
Study group: replaced by public charters; CFR Part removed, 36603
Supplemental air transportation certificates, reporting requirements, approval by Comptroller General, 3087
Travel groups; more than one origination or destination point, 2387
Travel groups; replaced by public charters; CFR Part removed, 36603
Trips and special services; off-route charter rules; all-cargo carriers, 42740
Trips and special services; public charters; editorial change, 36598
Emergencies, National; organization and operation:
Pricing and Domestic Aviation Bureau; establishment, 59835
Environmental statements preparation; designation of responsible officials; editorial change, 34119
Foreign air carrier; commingling of blind sector traffic; editorial change, 34117
Foreign air carrier permits; terms, conditions, and limitations authorizing charter transportation only; editorial amendment, 59829
Free and reduced rate transportation:
Handicapped and retired persons; definitions for fare purposes, 38380
Student fare availability to Guam, American Samoa, and Pacific Islands Trust Territory natives, 17468
Freedom of information:
Public release of staff memoranda, 22343
Military transportation; exemption of air carriers:
Charter rates; minimum, 7615, 38574
Foreign and overseas air transportation, minimum rates applicable to, 60433
National Environmental Policy Act; implementation:
Pricing and Domestic Aviation Bureau; establishment, 59830
Navigation of foreign civil aircraft within U.S.; editorial change, 34119
Organization and functions:
Accounts and Statistics Bureau, Director, et al.; authority delegation, 54623, 58180
Accounts and Statistics Bureau; transfer of functions, 54622
Consumer Protection Bureau, establishment, 47490, 47491, 47492
Evaluation Committee; compensation of participants in Board proceedings, 56885
Fees and charges for special services; magnetic tape copying, 38574
International Aviation Bureau; authority delegation, 34120
International Aviation Bureau, Director; schedule filing, etc., 40804
International Aviation Bureau; transfer of functions, 34120
Managing Director; authority delegation; target dates, 1617
Operating Rights Bureau, Director; air ambulance flights, 3703
Pricing and Domestic Aviation Bureau; air carrier exemptions, 31885
Pricing and Domestic Aviation Bureau, Director; pickup and delivery tariffs, authority delegation, 53650
Pricing and Domestic Aviation Bureau; establishment, 59829, 59831
Oversales:
Advertising disclosure of noncompliance with oversales rule, 50166, 53028, 57243
Bumping and boarding policies, 24283, 25667
Definition of "carrier", 59830
Policy statements:
Charter exemption applications, 31885
Domestic passenger-fare level structure and discount fare policies, 39535
Free and reduced rate transportation of persons, 60435
Public release of staff memoranda, 22343
Route proceedings, staff role, 19354
Tariff filings, 35027
Practice and procedure, economic proceedings:
Application requirements, 52022
Automatic market entry applications, 60433
Briefs, format filing changes, 25332
Carriers, local service; cost estimating, 17349
Certificated route authority, new or modified, applications, 21874, 41022
Complaint procedures, 39536
Complaints requesting suspension of tariffs, 1323
Consumer Protection Bureau, establishment, 47490
Continuances and extensions of time; authority transferred to Board Secretary, 8254
Enforcement proceedings; copies filing requirement, 60873
Enforcement proceedings; technical changes, 60871
Intervention; eligibility for compensation of participants, 56878
Petitions for reconsideration of instituting orders, filing, 7309
Unused nonstop route authority, 49530
Unused nonstop route authority; GAO approval of reporting requirements, 57141
Procedural regulations:
Board proceedings, conduct of separation of functions, 29936
Public charters:
Establishment; GAO approval, 49978
Reports, stock ownership:
Filing by owners of capital stock or capital of air carrier, 31316
Scheduled route service certificates; terms, conditions, and limitations; Comptroller General approval, 20966, 21453
Special services, fees and charges; public charters; editorial changes, 36618
Tariffs of air carriers and foreign air carriers; construction, publication, etc.:
Airline overbooking practices, 24277, 60145
Economic data, reduction in amount required to accompany tariff rate changes, 34117
Editorial changes, 21323
Filing periods, 1322, 3902
Hazardous materials; CAB filing requirements removed, 34442
Tariff justification change, 39536
Veteran's Day observance; tariff filing requirements, 52697

**PROPOSED RULES**

Accounts, records, and memoranda for air carriers, preservation:
Air carriers, all-cargo; applicability, 33733
Indirect air cargo carriers, 15720, 21465
Accounts and reports for air freight forwarders and international air freight forwarders; uniform system:
Indirect air cargo carriers, 15720, 21465
Accounts and reports for certificated air carriers; uniform system:
Advertising costs, airline, 11833
Air carriers, all-cargo, 33733
Corporate disclosure regulations, model; terminated, 14523

Debt restructurings, troubled, prior period adjustments and forward exchange contracts, 25138
En route and airport facilities and services; charges by foreign Governments and entities; form 41, 26449
Lobbying costs, airline; extension of time, 11833
Air carrier accounts, records, and memoranda; preservation, 50151, 60948
Air carrier and foreign air carrier names; indirect air cargo carriers, 15720, 21465
Air carriers, all-cargo; general rules, 33733, 45383
Air carriers, certificated route, and foreign route air carriers; freight loss and damage claims data reporting; CFR Part removal, 58193
Air carriers; exemption from filing tariffs for interstate and overseas charters, 20521
Air freight forwarders, cooperative shippers associations, etc.:
Indirect air cargo carriers, 15720, 21465, 45383
Air taxi operators, classification and exemption:
Alaska and Hawaii, all-cargo operations, aircraft size increase, 13892
Capacity limitation increase, 39587
Reporting requirements, 52182
Air transportation services; performance quality; public information availability; advance notice, 19667
All-cargo services, scheduled; reporting results; CFR Part removed, 33733
Board proceedings, participation of air carrier associations, 7445
Charters:
Advance booking; air taxi operators and commuter air carriers operating special regulation charters, 30296
Advance booking; liberalization of rules, 6808, 11215, 13892, 24542, 25141, 27560
Consumer protections for participants; prospectus filing procedures, 53450
Foreign air carriers; flight delays and substitute air transportation, 5383, 8266
Foreign air carriers; liberalization of rules, 11215, 13892
Foreign air carriers; split all-cargo and split passenger-cargo, 14519, 20240
Inclusive tours; air taxi operators and commuter air carriers operating special regulation charters, 30297
Inclusive tours; liberalization of rules, 11215, 13892
Indirect air cargo carriers, 15720, 21465
One-stop inclusive tours; air taxi operators and commuter air carriers operating special regulation charters, 30297, 31945
One-stop inclusive tours; liberalization of rules, 6808, 11215, 13892
Participants funds, protection, 17967
Participants' funds, protection; uniform procedures; supplemental notice, 3285
Study groups; air taxi operators and commuter air carriers operating special regulation charters, 30296
Study groups; liberalization of rules, 11215, 13892
Supplemental air transportation; split all-cargo and split passenger-cargo, 14519, 20240
Supplemental air transportation certificates, conditions and limitations; flight delays and substitute air transportation, 5383, 8266
Supplemental air transportation certificates; liberalization of rules, 11215, 13892
Travel groups; air taxi operators and commuter air carriers operating special regulation charters, 30296
Travel groups; liberalization of rules, 11215, 13892
Trips and special services; flight delays and substitute air transportation, 5383, 8266
Trips and special services; liberalization of rules, 11215, 13892
Trips and special services; off-route charter limitations, 2882, 6621
Trips and special services; split all-cargo and split passenger-cargo, 14519, 20240
Citizen of U.S.; corporations qualifying as; advance notice, 10938, 12333, 18196, 29011, 32308, 41410, 49315, 49992
Compensation of participants in CAB proceedings, 14044, 15730
Conduct standards, Board proceedings, 16990
Foreign air carrier permits; terms, conditions and limitations; waiting period for discontinuance of operation schedules, 54665
Free and reduced rate transportation:
Handicapped and retired persons; definitions for fare purposes, 8266
Intrastate carriers; exemptions, 49992
Officers, directors, and employees of carriers operating in foreign countries; exemption, 39805
Student fare availability to Guam, American Samoa, and Pacific Islands Trust Territory natives, 6621
Freight origin-destination traffic movement, reporting data; termination, 34788
Hazardous materials; DOT regulations filing requirements, 15334
Military transportation; exemption of air carriers; charter rates, minimum, 25433
National Environmental Policy Act; implementation; advance notice, 38025
Organization and functions:
Indirect air cargo carriers; extension of time, 15720, 21465
Oversales, advertising disclosure of noncompliance, 39806
Policy statements:
Advertising costs, airline; accounting and reporting requirements, 11833
Charters; minimum rate guidelines for service between U.S. and Europe; termination, 46980
Domestic passenger-fare level and structure and discount fare policies, 16503
Group fares, scheduled services; proceedings terminated, 36053
Hearings, standards for determining priorities; terminated, 35490
Tariffs; price/quality of service options, 51641, 54102
Practice and procedure, economic proceedings:
Brief filing; format changes, 15334
Complaint procedures, 16503
Complaints requesting suspension of tariffs, 34788
Tariffs; price/quality of service options, 51641, 54102
Unused nonstop route authority applications, 19403, 21690, 22987, 49993, 50696, 60283
Public charters:
Consumer protections for participants, 39807, 49994
Modification of bond requirements, 40880
Reports, stock ownership; model corporate disclosure; terminated, 14523
Supplemental air transportation certificates; elimination of advertising requirements, 22378
Tariffs of air carriers and foreign air carriers; construction, publication, etc.:
Complaints requesting suspension of tariffs, 34788
Economic data, reduction in amount required to accompany tariff rate changes, 12029
Group fares, scheduled services; proceedings terminated, 36053
Interstate live-animal airbills, statement required; terminated, 11225
Price/quality of service options, 51641, 54102
Tariff justification change, 16503
Unused nonstop route authority procedures, 60283

**NOTICES**

Air cargo pick-up and delivery zone, application for tariff filing authority, 11246, 25160
Airline Deregulation Act of 1978; applicability to pending cases, 54670
Airline industry merger policy seminars, 49343
Airlines Mutual Aid Agreement; dismissal order, 60629
Authority delegations:
Pricing and Domestic Aviation Bureau, Director; unused nonstop route authority applications, 49555
Boarding compensation and priority rules; "bumping" by overbooking; investigation, 38449
Certificate of public convenience and necessity; applications, 10612, 22764
Charters:
Canadian foreign air carriers; charter authority, 54669
Emergency transportation requirements, 29341
U.S. and foreign air carriers; exemption and blanket waiver, U.S.-U.K., 35519
U.S. and foreign direct and indirect, economic and special regulations waived, 21916, 23623, 29156, 31422
Committees; establishment, renewals, terminations, etc.:
Aviation Mobilization Industry Advisory Committee, 29024
Emergency air transportation requirements:
Northwest Airlines pilots strike, flight changes, 16789, 33280
Environmental statements; availability, etc.:
Route authority; multiple permissive awards to all qualified applicants, 59864
Fares, domestic passenger; increase; various carriers, 16788
Hazardous articles rules and practices investigation, 7337, 8574, 20830, 29595
Improving Government regulations; inquiry, 29251
Mail rates, domestic service priority and nonpriority, 55430, 58212, 60630

Meetings:
Airline industry merger policy, seminars, 49343
Meetings; Sunshine Act, 61, 816, 1430, 1581, 1883, 2043, 2044, 2272, 2273, 3339, 4173, 4316, 5130, 5470, 6198, 6353, 7393, 7518, 8057, 8224, 8343, 8920, 9217, 9550, 9761, 10466, 10467, 10789, 10790, 11298, 11891, 11892, 12812, 13161, 13162, 13966, 14272, 14371, 15055, 15404, 15552, 16643, 16644, 16880, 17443, 19103, 19496, 19985, 20085, 20367, 20891, 21974, 21975, 21976, 22153, 22295, 22805, 23842, 24171, 24953, 24954, 25224, 25405, 25528, 25769, 25770, 25936, 26679, 26680, 26877, 27280, 27639, 28081, 28894, 29055, 29246, 29662, 29886, 30026, 30027, 30185, 30389, 31099, 31502, 32367, 32529, 32530, 33372, 33873, 35432, 36197, 36758, 37073, 37331, 38165, 38503, 38504, 38782, 38783, 39214, 39636, 40099, 40599, 40600, 41464, 42100, 42851, 43408, 43615, 44964, 45509, 46416, 46625, 47076, 47811, 49105, 49106, 49411, 49885, 49886, 50123, 50279, 50538, 50985, 51196, 51502, 51895, 52090, 52358, 52846, 53895, 54174, 54350, 54775, 55055, 55837, 56753, 56754, 56755, 57419, 58254, 58255, 59242, 59243, 60248, 60719, 61083, 11298A
Practice and procedure, economic proceedings:
GAO clearance for unused nonstop route authority proceedings, 50719
Route authority, unused nonstop; certificates; application procedures, 49556
Tariff observance requirements, U.S. and Foreign air carriers, exemption, 58210
Youth standby fares; feasibility and economic impact; inquiry, 782
*Hearings, etc.:*
AAT Airlines, Inc., et al., 11839
Aero Trades (Western) Ltd., 59408
Aerolineas Argentinas, 55269
Aerolineas Dominicanas, S.A., 18595, 19897, 23623, 26463, 43508
Aeronaves de Mexico, S.A., 16358
Aeroperu, 1813, 2648
Aerovias Nacionales de Colombia, S.A., 5635, 39627
Aerovias Quisqueyana, C. por A., et al., 1813, 22428
Air Express International Airlines, Inc., 59857
Air India, 2906
Air Jamaica Ltd., 23007, 26100
Air Nauru, 1813, 4080
Air New England, Inc., et al., 31051, 31420, 36666
Air North Charter & Training Ltd., 26463
Air Panama Internacional, S.A., 45622, 51111
Air Sunshine, 54968, 58209
Air Wisconsin, Inc., 54112
Air Wisconsin certification proceeding, 40253
Airline Tariff Publishing Co., 6825
Alaska Airlines, Inc., et al., 10611, 24881, 25845, 28220, 29023, 29024, 36294, 51115
Alaska fares investigation, 11591
Allegheny Airlines, Inc., et al., 2418, 3146, 6976, 7993, 11839, 18584, 25703, 41247, 46985, 46992, 47587, 50228, 51117, 56078, 58596, 60630
Aloha Airlines, Inc. et al., 15345, 16786, 17993, 19897, 39840
American Air Transport, Inc., 22428
American Airlines, Inc., et al., 2900, 3297, 18585, 25159, 25160, 41248, 43748, 46993, 51112, 56078
American Association Zoological Parks et al., 46558
American Samoa; restoration of adequate air service, 53785
Arizona service investigation, 25351, 27575, 40543, 45622, 52036
Aspen Airways, Inc., 58209
Atlanta-Memphis service investigation, 51694, 52036
Atlanta-Portland/Seattle Subpart N proceeding, 45422, 46558, 49029
Austin/San Antonio-Atlanta service investigation, 8168
Austin/San Antonio-Atlanta service investigation et al., 7993, 8168, 14706, 16788, 17847
Avianca Airlines, 60312
Baltimore/Washington-Houston low-fare route case et al., 9513, 9514, 17378
Baltimore/Washington-St. Louis route proceeding, 17847, 21916, 46558, 46987
Belize Airways Ltd., 30323
Boise-Denver nonstop proceeding, 7336, 23007
Boston/New York/Philadelphia/Baltimore/Washington-Puerto Rico/Virgin Islands investigation, 13408, 13909, 15761, 26465
Braniff Airways, Inc., et al., 12899, 14331, 14706, 16529, 18586, 24882, 31421, 33277, 38882, 41249, 43508, 46059, 46994, 52037, 55270, 56079, 57630, 59411
British Airways Board, 14090
British Airways et al., 28021
British Caledonian Airways, Ltd., 21342, 23007
British West Indian Airways Ltd., 60312, 60975
Brooker-Wheaton Aviation Ltd., 52038
Calgary Transportation Authority et al.; correction, 2744
California-Arizona low fare route proceeding, 38064, 41419, 43051, 51118, 55270, 59857
California-Florida low fare case, 43051
California-Nevada low-fare route proceeding, 1973, 22429
California-Southwest-Western Mexico route proceeding, 21919, 22429, 25456, 30591, 41419
Canadian World Wide Livestock Forwarders Ltd., 10951
Cargo Charter transfer rate investigation, 14707
Caribbean area service investigation et al., 13409, 15175, 18727, 48672, 51123
Cayman Airways, Ltd., 15346, 19255
Chicago-Albany/Syracuse-Boston competitive service investigation, 6292, 22763, 47592
Chicago-Midway expanded service proceeding, 31053, 32156, 34513, 39842, 43051, 47594, 49029, 59115
Chicago-Midway low-fare route proceeding, 1377
Chicago/Texas/Southeast-Western Mexico route proceeding, 57935
Club Med, Inc., 26
Colonial Airlines, Inc., 20360, 28845
Colorado ski-points investigation et al., 9834, 27575, 28845
Commuter/certificated carrier joint fares, 57313
Compagnie Nationale Air France et al., 9630, 24885, 25846, 29341
Compania Mexicana de Aviacion, S.A., 5644, 19057
Conner Air Lines, Inc. et al., 22763, 36128, 59857
Continental Air Lines, Inc., et al., 988, 2420, 11840, 33278, 38066, 51114, 59411
Continental Airlines, Inc., Subpart M proceeding, 49343
Continental-Western merger case, 46558, 54283
Corporacion Aeronautica de Carga, S.A., 31421, 39405
Costello Travel Service, Inc., et al., 8574, 13597, 19059
Dallas/Fort Worth-Florida service investigation, 25847, 26467, 29156, 31960, 33948, 53481, 54113
Dallas/Fort Worth-Tucson investigation, 8819, 32844
Dallas/Fort Worth/Houston-Philadelphia service investigation, 19698, 27874, 28845, 29821, 29972, 30325, 32157
Dan-Air Services Ltd., 18221
DeLaval Turbine, Inc., et al., 25351
Delta Air Lines, Inc., et al., 5401, 10714, 18224, 21496, 23008, 25159, 56080, 59412, 59857
Denver-Alaska service investigation, 52272, 53051
Denver-Seattle-Ketchikan-Juneau-Anchorage-Fairbanks investigation, 47988
Domestic passenger-fare investigation, 21344, 26468
Dominicana Airlines, 60312
Duncan Airlines et al., 41252
Eastern Air Lines, Inc., et al., 2744, 18587, 25161, 25849, 41063, 41250, 41251, 43509, 43510
El Al Israel Airlines Ltd., 21027
Emery Air Freight, 58210
Empresa Guatemalteca de Aviacion, 2648, 30087
Evergreen International Airlines, Inc., et al., 39629, 41252
Federal Express Corp. et al., 13407
Federicton Flying Club, Inc., 54973
Fleming International Airways, Inc., 60177
Florida service case, 35088, 36499, 40254, 43051, 44875, 46355, 58397
Florida-Atlanta competitive nonstop service case, 6825, 22429, 27575
Florida-Mexico City investigation, 26604, 45910
Flying Tiger Line, Inc., et al., 3602, 7678
Foreign air carriers, 29342, 40544
Former large irregular air service investigations, 33779, 36128, 36988, 37207, 37477, 38449, 43512, 46356, 47764, 51117, 53784, 55270, 56080, 56929, 60312
Frontier Airlines, Inc., et al., 6642, 16206, 17516, 18588, 25704, 28022, 33280, 33788, 41065, 44875, 47593, 56080
Gelco Corp., 26765
Hawaiian Airlines, Inc., et al., 25161
Hazardous articles investigation, 7337
Hazardous articles rules and practices investigation, 8574, 20830, 29595
Houston and London, budget fares between, 38883

Houston service investigation, 39844, 46987, 55271
Houston-Phoenix/Tucson case, 32443, 35520, 35971, 41065, 47593, 47764, 52041, 55271, 57937, 58212
Houston-Tampa/Orlando, New Orleans-Orlando investigation, 13412, 28846
Houston-Tampa/Orlando investigation, 1813, 2904, 22430
Hughes Air Corp. et al., 18231, 41066, 43512, 51694, 56081
Hughes Airwest, Inc., 1377, 3734, 7337, 15466
Iberia, Lineas Aereas de Espana, S.A., 10951
Inomotivator, Inc., 21344
International Air Cargo Corporation Egypt, 991
International Air Service Co. et al., 11840, 12736
International Air Transport Association, 26, 29, 990, 991, 1522, 1973, 2421, 2904, 3146, 3299, 3602, 3736, 4874, 5399, 6117, 6976, 7247, 8819, 8821, 8825, 9327, 11245, 12053, 13083, 16793, 16794, 16795, 16796, 17378, 17380, 17849, 18595, 20360, 20361, 22227, 23008, 24887, 25456, 25839, 27576, 29595, 31421, 32320, 32443, 33790, 34175, 35971, 36121, 36499, 46557, 57630, 57932, 58597
International Developers, Inc., 36127
International service segment data, etc.; Freedom of Information Act request, 38739
International shipments, payment, 33787
Iran National Airlines Corp., 58397
Jugoslovenski Aerotransport, 29158
KLM-Royal Dutch Airlines, 1978
Kodiak-Western Alaska Airlines, Inc., 6982, 15464, 18231, 20028, 22430, 24107
LIAT Ltd., 47988
Laker Airways Ltd., 25851, 29156, 39842, 57170
Las Vegas-Houston competitive service investigation, 8168
Las Vegas-Houston competitive service investigation et al., 7994, 8824, 27875
Las Vegas-Texas case, 26604, 33948, 45422
Linea Aerea Nacional-Chile (LAN), 14092
Lineas Aereas Paraguayas, 40254
Local service class subsidy rate; investigation, 5637, 18229, 19426, 26100
Loftleidir, H.F. (Icelandic Airlines), 49030
Louisville-Kansas City nonstop route investigation, 38067, 39632, 47589, 58598
Miami-Los Angeles nonstop and low-fare case et al., 2900, 5402, 9836, 21710
Midland and Odessa, Tex., air service, 47590
Nashville-Cleveland Subpart M proceeding, 12052
National Airlines, Inc., et al., 16790, 18589, 19059, 20360, 20831, 34514, 40256, 41066, 46994, 56082
New Orleans-West service investigation, 47589, 54976, 55272, 58209
Nordair Ltee, 58398
North Atlantic fares investigation, 24107
North Central Airlines, Inc., 5644, 25163, 41067, 46995, 56082
North Central-Southern merger case, 35975, 50007
North West Territorial Airways Ltd., 13083
Northwest Airlines, Inc., et al., 14331, 26468, 30323, 34514, 37477, 41253, 43514, 46995
Northwest Alaska service investigation, 18230
Oakland service case, 24083, 28223, 36500, 43515, 49826, 51119, 53484, 59865
Olympic Airways, S.A., et al., 2904
Omaha-Dallas/Ft. Worth Subpart N proceeding, 26465, 41253, 43529
Overseas National Airways, Inc., et al., 20362
Owen Sound Air Services Ltd., 47991
Ozark Air Lines, Inc., 7337
Ozark Air Lines, Inc., et al., 17517, 18589, 25164, 59412
Pacific Alaska Airlines, Inc., 56929, 58847
Pacific common fares investigation, 1813, 24885
Pan American World Airways, Inc., et al., 992, 2199, 6982, 7248, 7678, 8280, 8574, 9838, 14333, 18727, 20363, 20365, 25165, 25706, 28023, 29344, 32844, 35738, 43529, 46358, 46996, 46997, 51120
Pan American-National acquisition case et al., 40897, 51695
Peanuts fare investigation, 4446, 6826
Peel, William F., et al., 33285
Perimeter Aviation Ltd., 3734
Pevsner, Donald L., 1633, 12052, 14530
Philadelphia-Bermuda nonstop proceeding, 25454, 26469, 28844, 33279
Philippine Airlines, Inc., 1377
Phoenix-Des Moines/Milwaukee route proceeding et al., 4271
Phoenix-Las Vegas-Reno nonstop service investigation, 60178
Phoenix-Salt Lake City Service Investigation, 14336, 15346, 23750
Piedmont Aviation, Inc., et al., 9838, 17381, 17387, 18590, 41068, 43746, 46987, 46998, 52041, 56083
Pittsburgh-Los Angeles/San Francisco/Denver service investigation, 7337
Pittsburgh-Orlando-Daytona Beach route proceeding, 7678, 15467, 25167
Polskie Linie Lotnicze, 3298
Popular Latin Travel Agency, Inc., 47598
Primeras Lineas Uruguayas De Navegacion Aerea, 2202
Puerto Rico-Northern Europe service investigation, 34829
Puerto Rico/Virgin Islands freight rates, 16792
Quebecair, 54671
REA Express, Inc., 8280, 29340, 41068
Reeve Aleutian Airways, Inc., 41419, 45623
Roanoke-Pittsburgh service investigation, 47764
Rosenbalm Aviation, Inc., 58212
San Antonio-Denver route proceeding, 19255, 22228, 33281, 44875
San Francisco-Reno-Albuquerque-Texas service investigation, 26466, 27576, 28529, 33791, 36669, 51123, 51698
Saudi Arabian Airlines Corp., 37208
Schenkers International Forwarders, Inc., 14093
Schwaben Charters, Inc., 5402
Seagreen Air Transport Ltd., 54977
Singapore Airlines Ltd., 2202, 2649, 4272, 7338, 9176
Sky West Aviation, Inc., 30592
Societe Anonyme Belge d'Exploitation de la Navigation Aerienne, 1111, 15346, 17993
Southeast Alaska Service Investigation, 18231
Southern Airways, Inc., 15467, 18591, 46990, 54980
Spokane-Vancouver route proceeding, 21028, 26100, 37209
St. Louis-Denver-Las Vegas/Reno route investigation, 28846, 29972, 41068
St. Louis-Kansas City Subpart M proceeding, 43530, 53786
St. Louis-Little Rock-New Orleans service investigation et al., 37734, 39632, 52508
St. Louis-Louisville and San Francisco Bay Area nonstop case, 993, 17378
St. Louis/Kansas City-San Diego route proceeding, 4874, 5644, 7337, 24565, 28027
Standard Airways et al., 14707
Sterling Oil Co. of Oklahoma, Inc., et al., 24346, 26100
Super saver fares investigation, 5403, 8575, 13597
Supplemental carrier fill-up case, 15764
TACA International Airlines, S.A., 19426
Texas Airlines, Inc., 20833
Texas International Airlines, Inc., et al., 1111, 8575, 15348, 15761, 17993, 33281, 33792, 38885, 40897, 41069, 43748, 46991, 50228, 51824, 59865
Texas International Airways, Inc., 18592
Texas International-National acquisition case and enforcement investigation et al., 35739, 38886, 39405, 39632, 46559
Texas/Great Lakes-Eastern Canada service case, investigation, 45422, 53051, 57315, 60180
TigerAir, Inc., et al., 33794, 46359
Tradewinds Airways Ltd., 50230
Trans International Airlines, Inc., et al., 15762
Trans World Airlines, Inc., et al., 2422, 14530, 26766, 27877, 33282, 33283, 41069, 46990, 51435, 51698, 56929, 59413
Transatlantic fare increases, 40898, 48673, 57316
Transatlantic passenger fares between U.S. and Europe, 19898
Transatlantic service case, 58601, 59866
Transatlantic super-APEX fares, 4447
Transavia Holland B. V., 3923, 6826, 8825, 23750
Transcontinental Airlines, Inc., 59866
Transcontinental low-fare route proceeding, 8825, 39632
Transpacific low fare route investigation, 35363, 36127, 60180
Transportes Aereos Benianos, S.A., 3923
Transportes Aereos Bolivianos, 54673
Tucson-San Diego nonstop route investigation, 26469, 27576, 41253
Twin Cities-Kansas City-Oklahoma-Texas route proceeding, 8169
Twin Cities-Kansas City-Oklahoma-Texas route proceeding et al., 7454, 8574, 9176, 21917, 28847, 35090, 43051, 44875, 52273, 54113
Twin Cities-Las Vegas/Phoenix/San Diego route proceeding, 1976, 2422, 3147, 19699, 26604
U.S.-Bahamas service investigation, 16207, 21028, 38611

U.S.-Benelux low-fare proceeding et al., 26761, 28027, 30325, 30850, 40544, 47993
U.S.-Caribbean/Bermuda fare increases, 48672
U.S.-Italy fare revisions, 54972
U.S./Caribbean passenger fares, 17516
United Air Lines, Inc., et al., 12054, 18593, 41254, 43530, 46992, 54675, 56084, 56085, 57171
Universal Air Travel Plan, 58598
Western Air Lines, Inc., et al., 6117, 12352, 14334, 14336, 14709, 54676, 56086
Wichita case et al., 15761, 17517, 20830, 21712
Wichita improved authority case et al., 59858
Wien Air Alaska, Inc., 50232
World Wide Livestock Services, Ltd., 14980
WTC Air Freight, 10715
WTC Airlines, Inc., 60631
Yellow Bird Air, 54970
Youngstown, Ohio, City of, et al., 29972
Yucatan service case et al., 38611, 49032

## CIVIL RIGHTS

*See Civil Rights Commission.*
*Education Office.*
*Equal Employment Opportunity Commission.*
*Federal Contract Compliance Programs Office.*
*Health, Education, and Welfare Department.*
*Housing and Urban Development Department.*
*Justice Department.*

## CIVIL RIGHTS COMMISSION

**NOTICES**

American Indians; denial of equal protection of law; hearings:
South Dakota, 27221
Immigration and nationality laws; denial of equal protection of law; hearing:
Washington, D.C., 44875, 47224, 51435
Meetings; regional advisory committees:
Mid-Atlantic, 51124
Northwestern, 13911
Southern, 13911
Southwestern, 51825
Western, 13911, 54114
Meetings, State advisory committees:
Alabama, 13910, 13911, 51124, 54677
Alaska, 1112, 13911, 15468, 20259, 33795, 39847, 46559, 60312
Arizona, 13911, 19699, 51824
Arkansas, 21921, 33795, 38068, 46559
California, 8169, 10952, 13911, 20523, 22066, 49826, 54113
Colorado, 3147, 4663, 8170, 13910, 20523, 36669, 41420, 46561, 51124, 54677
Connecticut, 8169, 18231, 21922, 29821, 36128, 37478, 39405, 47765, 49826, 60312
Delaware, 9176, 14709, 47765, 55272
District of Columbia, 9839, 13086, 16531, 20524, 50488
Florida, 13911, 24108, 24721, 31190, 47765, 54677
Georgia, 13911, 47765, 54677
Hawaii, 19311, 19699, 33796, 54113
Idaho, 13910, 13911, 15468, 22430, 24721, 26469, 26470, 46559
Illinois, 9177, 13910, 17518, 22066, 36128, 43051, 49826, 55435
Indiana, 15469, 20259, 22766, 31190, 46559, 52508, 55435
Iowa, 1112, 16207, 36129, 37478, 44560, 46559, 49826, 58605
Kansas, 9177, 16531, 41420, 44560, 49826
Kentucky, 13911, 26470, 29821, 38068, 40544, 51124, 54677
Louisiana, 47765
Maine, 8169, 21922, 27576, 39405, 46560, 47765, 49826, 51824
Maryland, 9839, 16531, 24721, 33796, 43531, 54114
Massachusetts, 8170, 11592, 16207, 21921, 26470, 29821, 29822, 36129, 38612, 44560, 49826, 51824, 58605
Michigan, 9177, 13910, 24721, 29822, 38068, 44560, 54114, 55435
Minnesota, 13910, 19699, 25852, 38068, 46998, 49827, 55435
Mississippi, 13911, 43531, 54677
Missouri, 16207, 27576, 39405, 39406, 41420, 44560, 45623, 49826, 50953, 55272
Montana, 8170, 14709, 29822, 46561, 49827, 54114, 54677
Nebraska, 16208, 21921, 35090, 44560, 46560, 49826, 60312
Nevada, 13911, 20259, 41420, 51824
New Hampshire, 8170, 13911, 24722, 29822, 45623, 49826, 51824
New Jersey, 3147, 14709, 16208, 20259, 38613, 46560, 49826, 51824
New Mexico, 47766
New York, 4664, 11592, 13911, 20259, 26470, 28224, 36129, 46560, 49826
North Carolina, 13911, 47766, 54677
North Dakota, 8170, 14709, 19699, 20524, 31960, 33796, 39406, 46561, 47766, 51825, 52509, 54677
Ohio, 13086, 28529, 36129, 42775, 45623, 49827, 55435
Oklahoma, 47766
Oregon, 13911, 15468, 20260, 46560, 54114
Pennsylvania, 9840, 20260, 24722, 36129, 46561
Rhode Island, 8170, 13912, 47766, 49826
South Carolina, 13911, 22767, 47766, 51825, 54114, 54677
South Dakota, 6984, 8170, 18231, 29822, 46561, 54677
Tennessee, 13911, 21921, 36129, 49827, 54677
Texas, 38068, 47767
Utah, 3147, 3924, 5404, 8170, 13912, 46561, 51825, 54677
Vermont, 8170, 13912, 21921, 26470, 29822, 35090, 39406, 46561, 49826, 51825, 54115, 56930, 60313
Virginia, 9177, 17518, 22430, 38068, 49827, 58606
Washington, 13911, 15468, 19699, 25168, 32320, 46561, 55273
West Virginia, 9840, 16208, 21921, 33796, 41255, 47767, 54677
Wisconsin, 16208, 21496, 26470, 38613, 54677, 55435
Wyoming, 8170, 14709, 36670, 39406, 46561, 54677, 60313
Meetings; Sunshine Act, 1430, 3240, 5468, 9762, 11784, 15835, 17444, 20085, 24168, 24789, 32532, 38165, 47811, 51895, 54775, 56336, 57717, 58893

## CIVIL SERVICE COMMISSION

*See also Federal Prevailing Rate Advisory Committee.*

**RULES**

Administrative law judges; appointment, pay, and removal; incentive award eligibility, 43013
Allowances and differentials:
Nonforeign areas, cost of living rates and area listing; Guam and Hawaii, 12293
Appeals; injured employees, 2379
Career and career-conditional employment:
ACTION community volunteers; noncompetitive appointment, 20954
Energy Department employees, 14002
Noncompetitive examining authorities delegated to agencies, 34428
Departmental competitive service positions in Washington, D.C. area:
Apportionment and residence requirements; CFR Subpart deleted, 8149
Employee selection procedures; uniform guidelines, 38310
Employment:
Ceiling on permanent employees and obligated positions; removed, 51753
Equal opportunity:
Age group coverage, nondiscrimination, 5794
Handicaps, physical or mental; nondiscrimination, 12295
Remedial action; retroactive, 52695
Excepted service:
ACTION, 4586, 8777, 9782, 12291, 14001, 15607, 21635, 39070, 39952, 51381
Administrative Office of U.S. Courts, 43431, 45550
Agency for International Development, 21635, 39070
Agriculture Department, 3253, 4585, 6913, 7199, 16306, 25989, 26411, 30263, 31307, 36591, 36592, 40453, 50158, 51381
Air Force Department, 5793, 12291, 39069
Appalachian Regional Commission, 30263, 31308
Arms Control and Disarmament Agency, 1921, 58541
Army Department, 5793, 51382
Arts and Humanities, National Foundation, 8149, 12845, 13491, 14637, 16305, 16306, 16967, 19337, 21635, 22667, 25989, 34427, 35017, 35645, 36593, 37979, 39953, 46287, 48989, 50157, 50158, 51382, 51383, 53703, 56204, 57489, 58540, 58541, 59823, 60137
Cabinet Committee on Opportunities for Spanish Speaking People, 59823
Civil Aeronautics Board, 1921, 2815, 28429, 58541, 59055
Civil Rights Commission, 12845
Coastal Plains Regional Commission, 2816
Commerce Department, 1471, 1921, 2815, 3693, 4585, 4963, 9782, 12291, 12292, 16305, 16967, 19337, 22667, 25417, 27158, 28429, 29763, 30263, 30787, 31308, 31309, 33675, 34427, 36592, 39070, 39951, 45550, 46287, 48989, 49525, 51381, 56873, 56874, 58539
Commodity Futures Trading Commission, 8149
Community Services Administration, 5793, 18642, 31307
Consumer Product Safety Commission, 12291, 15607, 18641, 25989, 26411, 57491
Defense Department, 1471, 1473, 2377, 3253, 3693, 6913, 12291, 13491, 18641,

25076, 31305, 39951, 48989, 48990, 49525, 51382, 53703, 56873, 58539
District of Columbia Government, 16305
Energy Department, 1472, 1922, 2377, 3993, 4963, 6913, 6914, 8149, 8251, 8777, 9781, 12291, 12292, 14001, 14637, 14638, 15607, 20953, 22001, 22667, 22668, 25076, 25417, 25989, 26411, 27157, 29763, 30263, 31307, 31309, 32115, 32735, 34428, 35645, 39070, 39951, 39952, 45549, 45550, 48989, 49525, 49526, 50157, 51381, 58540
Entire executive civil service; anti-inflation program, 56204
Entire executive civil service; employment of students, 47167
Entire executive civil service; Harry S. Truman Foundation Scholarship Program, 18159
Entire executive civil service; legal interns, 39952
Environmental Protection Agency, 9781, 25990, 39070, 45549, 56873, 58540
Equal Employment Opportunity Commission, 14637, 22001, 25990, 39952, 59055
Executive Office of President, 2377, 3253, 6913, 14001, 16305, 21635, 21636, 32735, 33675, 36591, 45550, 57489
Export-Import Bank, 39951, 45550, 51382, 57490
Farm Credit Administration, 1472, 19337, 25075, 25990
Federal Deposit Insurance Corporation, 3994, 34427
Federal Home Loan Bank Board, 1921, 4585, 25989, 32115, 34428, 36591, 39069, 57489
Federal Maritime Commission, 1922, 29763
Franklin Delano Roosevelt Memorial Commission, 55333
General Services Administration, 2377, 4963, 31307, 51383, 56874
Health, Education, and Welfare Department, 1472, 1474, 4963, 5793, 6913, 7199, 8777, 9782, 12291, 12292, 14001, 16305, 19813, 21636, 25990, 27157, 29763, 31307, 32115, 33675, 34427, 36043, 36591, 43431, 45549, 47168, 49526, 51382, 56873, 58540
Housing and Urban Development Department, 2167, 2815, 3253, 4963, 5793, 6914, 7199, 9781, 12292, 14001, 18641, 20953, 22001, 22667, 25076, 28429, 31309, 39951, 39953, 43431, 49525
Interior Department, 1921, 2377, 4586, 5793, 6914, 7609, 9782, 11689, 16306, 18641, 19337, 22667, 27075, 27157, 28429, 32735, 36591, 36592, 57490, 58541
International Communication Agency, 34427, 48990, 51383
International Trade Commission, 5793, 7199, 15607, 34428, 39952
Interstate Commerce Commission, 16967, 19069
James Madison Memorial Commission, 55333
Justice Department, 3993, 6913, 6914, 8777, 12845, 13491, 16305, 20953, 25076, 31309, 35645, 36591, 36592, 39069, 45549, 55333
Labor Department, 2377, 4964, 6913, 14637, 16967, 19337, 25076, 27775, 36592, 39070, 45550, 47167
Manpower Policy, National Commission, 31308
Metric Board, 48989, 59055
Mine Safety and Health Federal Review Commission, 51382, 51383
National Aeronautics and Space Administration, 13491
National Aeronautics and Space Council, 59823
National Credit Union Administration, 14001
National Mediation Board, 21635
National Transportation Safety Board, 16305, 18641, 45550, 51381
Navy Department, 20954, 25075, 49526, 51753
Noncompetitive examining authorities delegated to agencies, 34428
Occupational Safety and Health Review Commission, 5793
Pennsylvania Avenue Development Corporation, 3993
Positions other than of confidential or policy-determining character; nepotism restriction, 30263
Rail Public Counsel Office, 16307
Regional Commissions, Public Works and Economic Development Act, 36591
Renegotiation Board; CFR correction, 39069
Securities and Exchange Commission, 5793, 25075
Small Business Administration, 4586, 29763, 45550
Smithsonian Institution, 22668, 47168
State Department, 1474, 2378, 3693, 12291, 14638, 18641, 22668, 27157, 31309
Temporary boards and commissions, 2815, 16306, 27158, 36592, 41947, 46287, 47167, 49526, 50158, 53704, 55333, 56204, 57489, 57490, 58539, 59823, 60137
Transportation Department, 2816, 3254, 4586, 8149, 9782, 11143, 27775, 32115, 45549, 48989, 48990, 51383
Treasury Department, 1472, 1922, 2378, 3877, 3993, 9782, 16967, 25417, 27158, 45550, 50157
Truman, Harry S., Scholarship Foundation, 45550
Veterans Administration, 2377, 3994, 25417, 32116, 51382
Excepted service; annual republication; correction, 3253
Excepted service, employment in; appeal rights for injured employees, 2378, 4964
Federal employees, mandatory withholding of city income or employment taxes, 60857
Health benefits, Federal employees:
Benefit limits, registration and enrollment changes, etc., 52460
Enrollment, open season, 50671
Second review cycle and mini open season, elimination, 52461, 55333
Transfers from retired Federal employees health benefits program, 35018, 38569
Health benefits, retired Federal employees:
Coverage costs; government contribution increase, 35018
Life insurance, optional:
Rates, reduction, 32736
Life insurance, regular:
Rates, reduction, 32736
Pay administration:
Work schedule adjustments for religious observances, 46288
Pay classification, etc.; exclusions and stipends, 1473
Pay systems, conversions between; transfer of functions, 46288
Personal property claims, employees', 47163
Privacy Act; implementation, 46505
Qualification requirements, members-of-family restriction; revocation, 60857
Recruitment, selection and placement; appeal rights for injured employees, 2378, 6205
Reorganization:
Merit Systems Protection Board; appeals, 60857
Restoration to duty; appeal rights for injured employees, 2379
Temporary and term employment:
Noncompetitive examining authorities delegated to agencies, 34429
Selection of term employees, 27775
Voting rights program:
Alabama, 39387, 43464
South Carolina, 27841
Texas, 19853, 35704

**PROPOSED RULES**

Employee selection procedures; uniform guidelines; correction, 1506
Employee selection procedures; uniform guidelines; hearing and meeting, 9131, 11812, 14955
Equal opportunity:
Remedial action; retroactive, 33732
Health benefits, Federal employees:
Benefit limits, registration and enrollment changes, etc., 17474
Coverage for illegitimate children, 27843, 30806
Effective dates; birth or addition of child, 60932
Enrollment, open season, 35046
Health plans, discontinued; contingency reserves, 35047
Second review cycle and mini open season, elimination, 35046
Transfers from retired Federal employees health benefits program, 13583
Health benefits, retired Federal employees:
Coverage cost; government contribution increase, 13583
Intergovernmental Personnel Act programs:
Handicapped, nondiscrimination in federally-assisted programs, 43465
Personnel administration merit system standards, 20997
Privacy Act; implementation, 35721
Retirement:
Survivor annuity benefits for illegitimate children, 27843, 30806
Temporary assignment of employees between executive agencies and States, etc., 53761

**NOTICES**

Administrative law judges; qualifications; inquiry, 24565
Advisory committee review; inquiry, 6293
Allowances and differentials:
Non-foreign areas, Federal civilian employees; cost of living allowance; inquiry, 20524, 24565, 60978
Committees; establishment, renewals, terminations, etc.:
Federal Prevailing Rate Advisory Committee, 43531

Private Voluntary Agency Eligibility Committee, 56930
Ecologist, Federal; minimum educational requirements, 47225
Federal Prevailing Rate Advisory Committee; activities report, availability, 49032
Fund-raising within Federal Service for Voluntary Health and Welfare Agencies Manual, proposed revision; inquiry, 14710
Health benefits program, Federal employees; open season, 13597, 17518
Health benefits program, Health Alliance Health Plan termination, 43531
Improving Government regulations, 22157, 56253, 56418
Land surveyors; qualification standards revision, 56253
Meetings:
Federal Employees Pay Council, 1113, 5022, 8170, 9840
Private Voluntary Agency Eligibility Committee, 2906
Meetings; Sunshine Act, 6354, 8923, 12988, 18829, 36758
Noncareer executive assignments:
ACTION, 25168
Agriculture Department, 5860, 24565, 32157, 33797
Air Force Department, 22767
Army Department, 24566, 25168
Arts and Humanities, National Foundation, 12354
Civil Aeronautics Board, 2906
Commerce Department, 2422, 2907, 5021, 8825, 12354, 12899, 14709, 22767, 22768, 24566, 30325, 36670
Community Services Administration, 24565
Defense Department, 2422, 2423, 12354, 14709, 25168
Energy Department, 9840, 14709, 22767, 30325, 33797
Environmental Protection Agency, 2422, 6293, 22767, 22768
Equal Employment Opportunity Commission, 4663, 12354, 21712, 24566
Executive Office of President, 22767, 24565
Farm Credit Administration, 14709
Federal Energy Administration, 21712
Federal Home Loan Bank Board, 2907, 9840, 22767
Health, Education, and Welfare Department, 1522, 2423, 5021, 12354, 14709, 22767, 22768, 25168, 30325, 32845, 33797, 49556
Housing and Urban Development Department, 8171, 25168, 30325, 32845, 33797
Interior Department, 2423, 2907, 5021, 6293, 21712, 30325, 33797
Interstate Commerce Commission, 22768
Justice Department, 5022, 30325
Labor Department, 4664, 9840, 22767
Management and Budget Office, 2907, 25168
Pennsylvania Avenue Development Corporation, 14709
State Department, 24566, 25168
Transportation Department, 9840, 32845, 33797, 36670
Treasury Department, 32845
United States Information Agency, 4664
Veterans Administration, 9840, 30325
Water Resources Council, 2423
Personnel manual, Federal; promotion and internal placement; inquiry, 43051
Privacy Act; systems of records, 13597, 26471, 31426, 35739, 46561, 47767, 49770, 60983
Privacy Act; systems of records; annual publication, 40106
Regulatory agenda, semiannual, 56418
Reorganization:
Transfer of functions to Equal Employment Opportunity Commission, etc., 60984
White House Fellowships, President's Commission; report availability, 35975

## COAL

*See Economic Regulatory Administration.*
*Geological Survey.*
*Hearings and Appeals Office, Interior Department.*
*Land Management Bureau.*

## COAL INDUSTRY, PRESIDENT'S COMMISSION

### NOTICES

Hearings, 46391
Meetings, 41105, 43079, 53872

## COAST GUARD

### RULES

Anchorage regulations:
Alaska, 21459
California, 60458
Hawaii; correction, 21881
New York, 35480, 56040
South Carolina, 14470
Virginia, 28199
Artificial islands and fixed structures on Outer Continental Shelf:
Operations; casualty or accident reports; editorial changes, 43298
Boating safety:
Boats and associated equipment; flotation standards, 56858
Electrical systems, 36441
Flotation devices, personal; manufacturer, information pamphlet, 9767, 17356
Gasoline fuel systems, 36440
Manufacturer requirements; hull identification numbers assignment, U.S.-Canadian agreement, 14964
Vessel numbering; leased or chartered vessels, 17941
Boundary lines:
Establishment rule, 3562
Cargo containers safety approval:
Testing and approval, periodic examination, control and enforcement, etc., 16946
Cargo vessels:
Inspection and certification; address corrections, editorial changes, etc., 46546
Civil and criminal penalty proceedings, enforcement, 54187
Claims; authority redelegation of District Commanders, 27531
Claims; theft of personal property in quarters, 36930
Criminal penalties; editorial changes, 43298
Dangerous cargoes:
Bulk dangerous or flammable liquids; self-propelled vessels; safety standards;correction, 968
Self-propelled vessels carrying hazardous liquids; resuscitation equipment requirements, 57256
Solids in bulk; metal borings, shavings, etc., 8760, 11583
Districts, marine inspection zones, and captain of port areas:
Eastern hemisphere boundary line for CG Atlantic and Pacific areas, 8515
Houston COTP; location clarification, 40224
Second and Eighth Districts; boundary realignment, 2372
Seventh District; boundary realignment, 1056, 18553
Eleventh District; Los Angeles-Long Beach Marine Inspection; office relocation, 18553
Twelfth District; boundary realignment, 25955
Drawbridge operations:
California, 6770
Connecticut, 1337, 13379, 57250
Florida, 958, 8516, 8517, 22970, 30054, 44511, 54929
Georgia, 957, 39778, 41389
Louisiana, 3561
Maryland, 21459, 26720
Massachusetts, 11983
Michigan, 1337, 41390
New Jersey, 958, 21881, 41032
New York, 24830
Ohio, 6770
Oregon, 8517
Pennsylvania, 956
South Carolina, 30054
South Dakota, 1338
Texas, 52236
Virginia, 41390
Wisconsin, 957, 32412, 44510
Drilling units, mobile offshore; requirements, 56802
Electrical engineering:
Diving operations, commercial, 53683
Drilling units, mobile offshore; requirements, 56837
Electrical systems; address corrections, editorial changes, etc., 46546
Great Lakes pilotage:
Rate increase, 24996
Interpretive rulings:
COLREGS; correction, 10911
Lifesaving equipment:
Flotation devices, personal; label rewording, 9770, 10913
Flotation devices, personal; thread specifications and editorial changes, 27152
Load lines:
Voyages by sea, domestic and foreign; CFR correction, 31928
Marine engineering:
Address corrections, editorial changes, etc., 46545
Drilling units, mobile offshore; requirements, 56799
Piping systems and appurtenances; address corrections, editorial changes, etc., 46545
Piping systems and appurtenances; commercial diving operations, 53683
Pressure vessels; commercial diving operations, 53683
Marine investigation regulations:
Vessel reporting requirements, 25820
Marine occupational safety and health standards:
Diving operations, commercial, 53683

Marine safety functions; corrections, 4431
Marine sanitation device violations; written warnings by boarding officers, 22657
Measurement of vessels; waste materials deduction, 32109
Navigation areas, regulated:
Apra Outer Harbor, Guam; correction, 2170
Navigation safety regulations:
Marine radar system and collision avoidance equipment, 32112
Oceanographic vessels:
Inspection and certification; address corrections, editorial changes, etc., 46546
Passenger vessels:
Inspection and certification; address corrections, editorial changes, etc., 46546
Inspection and certification; expiration date stickers, 30771
Ports and waterways safety:
Alaska inland waterways navigation, 60458
Florida inland waterways navigation, 60458
Public information:
Document inspection facilities, 48646
Regattas; safety of life:
President's Cup Regatta, Potomac River, Wash., D.C., 25343
Regulatory analysis statements, 24996
Safety zones:
Chesapeake Bay, Md., 10342
Hudson River, N.Y., N.Y., 57877
Los Angeles Harbor, Calif., 53428
Los Angeles River Channel, Calif., 42749
Mile 730 lower Mississippi River to Mile 740, 59487
Ohio River, 12682
Upper Bay, New York Harbor, N.Y., 46532
Safety zones, establishment procedures; correction, 2170
Security zones:
East River, N.Y., 37689, 42748
Lower Hudson River, N.Y., 26721
New London, Conn., 29558
Tall Ships Squadron, 32412, 32413
Suspension and revocation proceedings:
Editorial changes, corrections, etc., 4431
Merchant seaman appeals to NTSB, 6779
Vessel security:
Identification credentials, 53427
Vessel traffic management:
Puget Sound; oil tankers, certain; entry prohibition, 12257, 39995, 40225
Vessels, harbors, and waterfront facilities; protection and security:
General supervision and control, 53427
Waterfront facilities and vessels; identification credentials, 53427

**PROPOSED RULES**

Anchorage regulations:
Delaware Bay and River, 3595
Louisiana, 59521
Maryland, 44550, 56058
Rhode Island, 56058
Artificial islands and fixed structures on Outer Continental Shelf:
Marine casualties reports, 48982, 49318, 50000
Boating safety:
Boats and associated equipment; display of capacity information, 43006
Boats and associated equipment; display of capacity information; correction, 53471
Boats and associated equipment; flotation materials standards, 9260
Boats and associated equipment; raceboat; safety and labeling exemptions; inquiry, 22411
Electrical systems, 60850
Equipment requirements; visual distress signals, 15118, 16194, 26336
Equipment requirements; visual distress signals; correction, 49440
Equipment requirements; visual distress signals; reopening of comment period, 49459
State numbering and casualty reporting systems, 15583
Ventilation systems; minimum safety standards, 32606, 41056
Ventilation systems; minimum safety standards; extension of time, 45399
Vessel numbering and casualty and accident reporting, 15583
Cargo and miscellaneous vessels:
Fire extinguishers; wheeled, semiportable, 52263
Cargo vessels:
Casualty reporting requirements, 48983
Exposure suits for vessels operating on Great Lakes, 25000
Stability standards, damage, for Great Lakes bulk dry-cargo vessels, 10946
COLREGS interpretations:
Navigation lights for small vessels, 39946
Dangerous cargoes:
Bulk dangerous or flammable liquids; self-propelled vessels; safety standards; benzene carriage requirements, 37149, 40250
Definitions, particular hazard cargo, etc., 25958, 32440
Radioactive material, low specific activity, 13402
Unmanned barges; benzene carriage requirements, 37149, 40250
Unmanned barges; visual identification; withdrawal, 53474
Deepwater ports:
Marine casualties reports, 48982, 49318, 50000
Drawbridge operations:
Connecticut, 22410
Florida, 982, 8560, 38434, 38435, 56059
Georgia, 23001
Louisiana, 6814
Maine, 4440
Maryland, 1363, 13401
Massachusetts, 9625, 41412
Michigan, 8559, 51649
New Jersey, 4439, 22410, 26756, 54957
New York, 982, 4440, 6815, 44551
North Carolina, 53472
South Carolina, 6816, 57305
Texas, 23002
Vermont, 4440, 6815
Virginia, 981
Wisconsin, 41413
Great Lakes pilotage:
Rate increase, 15590
Lifesaving equipment:
Exposure suits for vessels operating on Great Lakes, 25000
Manning of vessels:
Ocean operator, second class; manning requirements, 12218
Towing vessels, uninspected; licensing, 41178, 58394
Marine investigation regulations:
Casualty reporting requirements, 48983
Vessel reporting requirements, 9165
Marine oil; pollution liability and compensation:
Offshore oil pollution compensation fund, 56840
Merchant marine officers and seamen:
Motorboat operators and staff officers, licensing and registration; second class operator of uninspected towing vessels, 22653
Mobile offshore drilling units:
Fire extinguishers; wheeled, semiportable, 52263
Nautical schools:
Casualty reporting requirements, 48983
Navigation areas, regulated:
Great Lakes, 36486
Navigation requirements:
Great Lakes; lights to be displayed on pipelines, 6200
Inland waters; lights to be displayed on pipelines, 6200
Inland waters; yellow lights on tows, 30256
Western Rivers; lights to be displayed on pipelines, 6200
Western Rivers; yellow lights on tows, 30256
Oceanographic vessels:
Casualty reporting requirements, 48983
Exposure suits for vessels operating on Great Lakes, 25000
Fire extinguishers; wheeled, semiportable, 52263
Offshore oil pollution liability and compensation, 58833
Passenger vessels:
Casualty reporting requirements, 48983
Exposure suits for vessels operating on Great Lakes, 25000
Fire extinguishers; wheeled, semiportable, 52263
Operations; safety orientation of passengers, 28426
Pollution:
Oil transfer facilities and operations; water facilities; environment and safety, 15108, 18571
Ports and waterways safety:
Inland waterways navigation; Pass Manchac bridges, Louisiana; size of tows; restrictions, 59524
Regattas; safety of life:
President's Cup Regatta, Potomac River, Wash., D.C., 18571
Safety zones:
Port Valdez, Valdez, Alaska, 60614
Security zones:
Port Valdez, Valdez, Alaska, 60614
Small passenger vessels:
Ocean operator, second class; manning and licensing, 12218
Specifications:
Electrical equipment; visual distress signals, 49451
Equipment and materials approval, 49440
Fire extinguishers; wheeled, semiportable, 52263
Lifesaving equipment; distress signals, signal pistols, etc.; inspection and approval and testing procedures, 49445, 49447
Lifesaving equipment; visual distress signals; specifications, 49451

Tank vessels:
Casualty reporting requirements, 48983
Exposure suits for vessels operating on Great Lakes, 25000
Fire extinguishers; wheeled, semiportable, 52263
Unmanned barges; visual identification; withdrawal, 53474
Uninspected vessels:
Fire extinguishers; wheeled, semiportable, 52263
Operations; safety orientation of passengers, 28426
Vessel inspections:
Equipment and material; standards and specifications approval, 49440
Ventilation systems; minimum safety standards, 32606
Ventilation systems; minimum safety standards; extension of time, 45399
Vessel movement control:
CFR Part revoked, 25958, 43330
Vessel traffic management:
Arrival, departure, hazardous conditions, etc., 25958, 32440, 43330
New York harbor; VTS communications, reporting, and special operating rules, 6906
Oil tanker ownership information; marine environment protection, 15586, 18571, 27567
Puget Sound; oil tankers, 12840
Waterfront facilities explosives handling:
Liquefied natural gas facilities, 34362, 39832
Pollution; environment and safety, 15108, 18571, 32440, 43330

NOTICES

Bridges, highway; proposed construction:
Blackwater River, N.H.; hearing, 19746
Depue, Ill.; hearing, 42832
Jacksonville, Fla.; hearing, 24929, 31254, 42833, 50066
Lewiston, Idaho; hearing, 59565
Seattle, Wash.; hearing, 31254
Station Creek, S.C.; hearing, 1021
Bridges, railroad; proposed construction:
East Lyme and Waterford, Conn.; hearing, 53521
Cargo containers, approvals:
American Bureau of Shipping et al., 26810
Citizenship oath filing:
Bunge Corp., 24394
Louis Dreyfus Corp., 60690
Schlumberger Technology Corp., 35569
Committees; establishment, renewals, terminations, etc.:
Chemical Transportation Advisory Committee, 26811
Chemical Transportation Industry Advisory Committee et al., 2785
Ship Structure Committee, 28282
Deepwater port license applications:
Texas Deepwater Port Authority, 42831
Documentation of vessels:
Admiral Towing and Barge Co., 44581
Drawbridge operations:
Maryland; hearing, 3640
Equipment, construction, and materials; approvals and terminations, 41119, 41120
Freight containers, design and installation of door closing hardware; meeting, 2785
Highway proposed relocation:
Morgan City, La.; hearing, 24928
Marine sanitation devices; certifications granted, 8049
Marine sanitation devices; waivers for vessels 65 feet or less in length, 29637
Meetings:
Boating Safety National Advisory Council, 9676, 37787, 51733, 51734, 57995
Chemical Transportation Advisory Committee, 24929, 42832, 43402, 47039, 48752, 57995, 60690
Chemical Transportation Industry Advisory Committee, 3639, 8606, 10455, 12141, 18079
Coast Guard Academy Advisory Committee, 12775, 45485
Coast Guard and Pyrotechnics Signal Manufacturers Association, 53521
Freight containers, design and installation of door closing hardware; meeting, 2785
New York Harbor Vessel Traffic Service Advisory Committee, 1863, 32487
Rules of the Road Advisory Committee, 2253, 26352, 40331
Ship Structure Committee, 4475, 13457, 16234, 17437, 37050, 40331
Vapor control systems; seminar, 48752, 56121
Merchant vessel personnel license testing program; meeting, 36547
Navigation, National plan:
Loran-A termination schedule, 22474
Navigation and vessel inspection laws and regulations; suspension:
M/V Lionheart, 45485, 51161
Seafarers, training and certification standards; conference report and advance notice of proposed rules, 33356
Tanker safety and pollution prevention; information and regulatory implementation plan, 16886, 42833
Vapor control systems; seminar, 48752, 56121

## COMMERCE DEPARTMENT

*See also Census Bureau.*
*Economic Analysis Bureau.*
*Economic Development Administration.*
*Federal Statistical Policy and Standards Office.*
*Foreign-Trade Zones Board.*
*Industry and Trade Administration.*
*Maritime Administration.*
*Minority Business Enterprises Office.*
*National Bureau of Standards.*
*National Fire Prevention and Control Administration.*
*National Oceanic and Atmospheric Administration.*
*National Technical Information Service.*
*National Telecommunications and Information Administration.*
*Patent and Trademark Office.*
*Travel Service.*

RULES

Consumer product information labeling program, voluntary:
Performance characteristics labeling, 8254, 51615
Nondiscrimination:
Federally-assisted programs, 49303
Privacy Act; implementation, 43020
Procurement, 22035, 57603
Voluntary laboratory accreditation program, National; optional procedures for private sector, 49994

PROPOSED RULES

Nondiscrimination:
Handicapped in federally assisted programs, 53765
Voluntary laboratory accreditation program serving Federal agencies; optional procedures, 49812

NOTICES

Advisory committee review; inquiry, 8826
Advisory committees, closed meetings; reports, availability, 28228
Committees; establishment, renewals, terminations, etc.:
Asian and Pacific Americans Population for 1980 Census Advisory Committee, 25709
Black Population for 1980 Census Advisory Committee, 25710
Census Bureau Advisory Committee, 33287
Coastal Zone Management Advisory Committee, 52510
East-West Trade Advisory Committee, 58108
Economic Advisory Board, 59538
Gulf of Mexico Fishery Management Council Advisory Panel, 13604
Industrial Innovation Federal Policy Advisory Committee, 24116, 31427
International Legal Metrology Advisory Committee, 13420
Merchant Marine Academy Advisory Board, 30329
National Academy for Fire Prevention and Control, Board of Visitors, 52509
National Laboratory Accreditation Criteria Committee, 58222
Pacific Fishery Management Council Advisory Panel, 18601
Product Liability Advisory Committee et al., 44562
Regional Fishery Management Councils et al., 17026
Sea Grant Review Panel, 50489
Spanish Origin Population for the 1980 Census Census Advisory Committee, 59538
Technical Advisory Committee, 39604
U.S. International Maritime Satellite Preparatory Committee Working Group, 49347
Consumer product information labeling program, voluntary:
Thermal insulation for homes, proposed specification, 2204, 23488
Thermal insulation for homes; suspension of fees for participation, 23495
Fishery products, international codes of practice; availability, 34829
Floodplain management and wetlands protection; policy and procedures, 45284
Improving Government regulations; inquiry, 23170
Industrial R&D proposals to BIRD Foundation; invitation to U.S. and Israeli firms to submit jointly, 6828
Laboratory Accreditation Program, National Voluntary:
Concrete, freshly mixed field; testing laboratories accreditation, 27224, 58223
Thermal insulation materials; testing laboratories accreditation; fees and charges, 45298
Thermal insulation materials; testing laboratories accreditation; proposed criteria, 45290

Meetings:
Commerce Technical Advisory Board, 54678
Consumer product information labeling, voluntary, 2204
Economic Advisory Board, 1635, 15352, 35091, 57938
Grants Administration Task Force, 42777
Industrial Innovation Federal Policy Advisory Committee, 47602, 48679, 50011, 50489, 57637
Laboratory Accreditation Criteria Committee for Thermal Insulation Material, National, 18737, 25170, 28850, 54678
Regional Economic Development Federal Advisory Council, 16534, 31192
Scientific and Statistical Committee and Carribbean Fishery Management Council, 48678
Standards Policy Interagency Committee, 14341
Technical Advisory Board, 6991, 16796, 23753, 30090, 38451
Testing Laboratories, National Programs for Accrediting, International Conference on Recognition of, 3738
Testing Laboratories, National Programs for Accrediting, Second International Conference on Recognition of, 36503
Travel Advisory Board, 6991
Women Business Owners Task Force, 16797, 18232
National standards policy; inquiry, 6298
National Standards Policy Advisory Committee; policy recommendations and implementation plan, 57318
Nuclear non-proliferation; establishment of procedures, 25326
Organization and functions:
Administration, Assistant Secretary, 785, 12354
Administration, Assistant Secretary; appointment as principal energy conservation officer, 50489
Administration, Assistant Secretary; procurement operations and functions consolidation, 59417
Audit Office, 31056, 32321
Automatic Data Processing Management Office, 785
Census Bureau, 3738, 12356
Chief Economist, 3603
Civil Rights Office, 3608
Communications and Information, Assistant Secretary, 24349
Congressional Affairs, Assistant Secretary, 12359
Controller, Office of, 6132
Economic Affairs Office, 57939
Economic Analysis Bureau, 785, 15473, 43534
Economic Development Administration, 3604, 6127
Emergency Readiness Office, 21498
Federal Statistical Policy and Standards Office, 57940
Industrial Economics Office, 57940
Industry and Trade Administration, 35522, 38069, 38614
Industry and Trade Assistant Secretary, 27224, 35523
Inspector General Office, 59418
Intelligence Liaison Office, 15476
Maritime Administration, 32445
Maritime Affairs, Assistant Secretary, 3603, 15473
Minority Business Enterprise Office, 43537
National Bureau of Standards, 15473, 43534
National Oceanic and Atmospheric Administration, 6127, 6128, 21497, 27224, 51438, 57939, 59417
National Technical Information Service, 6131
National Telecommunications and Information Administration, 24348
Organization and Management Systems Office, 6132, 21498
Personnel Office, 15478
Policy Planning and Programs Office, 51443
Procurement and Automatic Data Processing Management Office, 59418
Product Standards Office, 17524
Public Affairs Office, 15479, 35523
Publications Office, 31058, 32321
Regulatory Economics and Policy Office, 38614
Science and Technology, Assistant Secretary, 36672, 39167
Travel Service, 57174
Privacy Act; systems of records, 4083, 25853, 28028, 32445, 36672
Privacy Act; systems of records; annual publication, 43112
Product liability and accident compensation issues; inquiry, 14612
Product liability and accident compensation issues; options paper; synthesis of public comments, 40438
Standard metropolitan statistical classification, proposed criteria for establishment; hearing, 26768, 53052
Statistical standards; responsibility transfer to Commerce Department (OMB Circulars A-39, A-46, and A-91 discontinued), 19260
Testing Laboratories, National Programs for Accrediting, International Conference on Recognition of; register for accrediting testing laboratories; inquiry, 3738
Testing Laboratories, National Programs for Accrediting, Second International Conference on Recognition of; meetings, 36503
Watches and watch movements; allocation of quotas:
American Samoa, 4274, 5035, 10718
Guam, 4274, 5035, 10718, 24566
Virgin Islands, 4274, 5035, 24566

## COMMISSION ON FINE ARTS

*See Fine Arts Commission.*

## COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED

*See Blind and Other Severely Handicapped, Committee for Purchase from.*

## COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

*See Textile Agreements Implementation Committee.*

## COMMODITY CREDIT CORPORATION

**RULES**

Cooperative marketing associations; eligibility requirements for price support, 4590, 59827
Emergency feed program, 26413
Export programs:
Agricultural commodities; sales financing, 1786, 25992, 29933, 45551, 47719
Risk assurance, non-commercial, 4035
Risk assurance program, non-commercial; defaults by government owned or controlled foreign banks, 59078
Industrial hydrocarbons and alcohols; pilot projects, 29926
Loan and purchase programs:
Barley, 2822
Corn, 2825
Cotton, 19194, 19198, 30038, 34104, 34759, 34762, 36236
Grain, 17461, 55741
Gum naval stores, 18988
Honey, 24263
Milk, 1062, 19204, 51603
Mohair, 2, 9456
Oats, 2830
Peanuts, 5501, 5502, 21428, 27160, 31314, 35470, 44467
Rice, 34757, 36046, 47972
Rye, 2835
Sorghum, 2837
Soybeans, 2841
Sugar, 1477, 21318, 24663, 37420, 38687, 39563, 50409, 50410, 55743
Tobacco, 9134, 29267, 29766, 46833, 54218, 56637, 58543
Wheat, 2845
Wool, 3, 9462, 15320

**PROPOSED RULES**

Agricultural commodities for donation, processed; procurement and shipment, 51406
Industrial hydrocarbons and alcohols; pilot projects, 20775
Loan and purchase programs:
Cotton, 39118
Feed grain program (1979), 37458, 38013
Gum naval stores, 4865
Honey, 4437
Milk, 4049, 25137, 34488
Peanuts, 2404, 14035, 17964, 26587
Rice, 17964, 58095
Sugar, 27994, 51026
Tobacco, 1351, 11707, 22727, 28817, 29130, 41991, 44542, 44546, 47197
Regulatory analysis statements, 39118

**NOTICES**

Grain and rice uniform storage agreements, National; extension, 19698
Grain reserve program; 1978 crop corn, suspension of immediate entries, 56077
Industrial hydrocarbons pilot program; inquiry; extension of time, 3146
Loan and price support programs; interest rate, 25453, 33276
Meetings; Sunshine Act, 7796, 9762, 11784, 23084, 24653, 39214, 43083, 44964, 48812, 55559
Monthly sales list:
June 1, 1977 through May 31, 1978, 4079, 13595, 22762

June 1, 1978 through May 31, 1979, 29819, 35737, 46354, 51693, 58396

## COMMODITY FUTURES TRADING COMMISSION

### RULES

Commodity Exchange Act regulations:
Contract market designation; continued compliance with requirements, 17814
Customer protection, 31889
Exchange procedures for disciplinary, summary and membership denial actions, 41962
Financial reporting requirements, minimum, 39967
Registration application denial; authority delegation to Commission staff, 59341
Registration forms; changes in registration information form, 1324
Registration forms; futures commission merchants, floor brokers, etc., 19648
Trading advisors, cash commodities; exemption, 32293, 36897
Commodity option transactions:
"Dealer options", 54226, 59353
Exemption from suspension, 23707, 47492
Reporting requirements, 52470
Suspension of offer and sale, 16161
Commodity transactions fraud; statutory authority citations, 47722
Customer protection rules, 31890
Exchange disciplinary or adverse action, review, 59343
Investigation rules; authority delegations, 55348
Leverage transactions:
Fraud in connection with all commodities, 58554
Gold and silver; temporary moratorium, 56887
Organization and functions:
Business disposition by seriatim Commission consideration, 43452
Central and western regions, geographic realignment; etc., 21659
Chairman, vacancy in position of; exercise of administrative authority, 50167
Enforcement Division, Director; authority delegation, 20971
Opinions Section, Chief; procedural motions; correction, 9143
Records and information:
Central and western regions, geographic realignment; etc., 21659
Reports:
Cash market positions; reporting requirements, 45827
Futures commission merchants and foreign brokers, 60149
Traders, 60149
Traders; data-processing media use, 37431

### PROPOSED RULES

Commodity Exchange Act regulations:
Contract market; maturing futures contract; limitation, 15438
Financial reporting requirements, minimum, 15072, 23729, 57286
Omnibus accounts on gross basis, reports, 22220
"Proprietary account," definition, 56906
Records subject to inspection; Commission accessibility, 50699
Spread trading, 32092
Commodity option transactions, 4869, 21022
Dealer options, 59396
Dealer options; reporting requirements, 37715
Leverage transactions:
Fraud in connection with commodity transactions, 52729
Suspension of offer and sale of contracts, 23729
Organizations and functions:
Commission staff, denial of registration applications, 53450
Position and daily trading limits; inquiry, 43034
Registered futures associations; Commission review of registration application, 46039
Reports:
Contract markets; futures prices publications, 37714
Futures commission merchants and foreign brokers; omnibus accounts on gross basis, 22220

### NOTICES

Committees; establishment, renewals, terminations, etc.:
State Jurisdiction and Responsibilities under Commodity Exchange Act Advisory Committee, 14712
Futures contracts, contract designations; 30 industrial stock average; Kansas City Board of Trade, 997, 1981, 43058
Futures contracts, proposed; availability, 18738, 20835
Improving Government regulations, 51125
Meetings:
State Jurisdiction and Responsibilities under Commodity Exchange Act Advisory Committee, 14712
Meetings; Sunshine Act, 1047, 1169, 1431, 2044, 2273, 2686, 3008, 3339, 3668, 3791, 4538, 5131, 6195, 6715, 6903, 7393, 7796, 9217, 9550, 9928, 10788, 11784, 12180, 13484, 13656, 15055, 15552, 15553, 16256, 16644, 17112, 17444, 18128, 19496, 19985, 20611, 21791, 22805, 23675, 23842, 24168, 24653, 24954, 25224, 25936, 26183, 26877, 27280, 27954, 28894, 29408, 29662, 30389, 30390, 30644, 31303, 32530, 32923, 34863, 35431, 35619, 35789, 36758, 38166, 38504, 39214, 39637, 40349, 41158, 42100, 42347, 43083, 43408, 43615, 43813, 44964, 44965, 46155, 46625, 47649, 48812, 49603, 49886, 50539, 51503, 51750, 51895, 51896, 52601, 53100, 53567, 55309, 55559, 56336, 57717, 58143, 58703, 58893, 59243, 59611, 59968, 11298A
Regulatory agenda, semiannual, 51125

## COMMUNICATIONS

*See Federal Communications Commission.*
*National Communications System.*
*National Telecommunications and Information Administration.*
*Rural Electrification Administration.*
*Telecommunications Policy Office.*

## COMMUNITY PLANNING AND DEVELOPMENT, OFFICE OF ASSISTANT SECRETARY

### RULES

Community development block grants:
Areawide programs; approval requirements and procedures, 34056
Categorical program settlement grants, completion of projects assisted under, 24656
Editorial changes, 24671
Eligible activities, 8439
Entitlement grants, 8459
Funds allocation and distribution, and general provisions, 4383
Indian tribes and Alaska natives, 12225, 34751, 58734
Loan guarantees, 2715
New communities, applications and criteria for discretionary grants, 19229
New communities; discretionary grants; interim rule, 60746
Small cities program, 8481
Urban development action grants, 1604, 13341
Urban development action grants; minimal standards of physical and economic distress, 50668
Urban development action grants; reporting requirements, 50669
Comprehensive planning assistance:
Areawide housing opportunity plans; special allocations, selection and approval, 34057
Urban homesteading program, 61156

### PROPOSED RULES

Community development block grants:
Construction, rehabilitation, or demolition assistance; relocation payments and assistance and real property acquisition, 13836
Discretionary grants applications and contracts for technical assistance, 25780
Property rehabilitation financing; lump sum drawdown, 34424
Rehabilitation assistance and program benefit, 41369
Urban development action grants; extension of time, 1610
Use of debarred, suspended, or ineligible contractors, 60769
Urban homesteading program, 23692

### NOTICES

Areawide housing opportunity plans, approved; special allocations; availability of grant and funds, 2370, 34060
Authority delegations:
Community Planning and Development Chicago Area Manager et al. withdrawal, 39855
Regional Administrators et al.; community development block grants, 34102
Regional Administrators et al.; urban homesteading, 23700
Community development block grants:
Indian tribes and Alaska natives, 14539, 29999
Innovative grants proposals, 1979 FY, 33885
Small cities discretionary grants, 9538, 58639
Technical assistance discretionary grants, application period, 25782
Urban development action grants; minimal standards of physical and economic distress, 61017
Comprehensive planning assistance:
State and regional strategies, incentive funding, 31796
Urban impact review grants, 57224

## COMMUNITY SERVICES ADMINISTRATION


**RULES**

Citizen participation grant program; establishment, 35312
Community action programs:
Income poverty guidelines, 14316
Community food and nutrition program, 30280
Conduct standards:
Financial interests reports, 51636
Emergency energy conservation program:
Crisis intervention program, 1979, 60466
Funding requirements, 9476, 21461
Funding requirements, energy assistance; income level eligibility for elderly, 14317
Policies and allocations for FY 1978 fundings, 9818
Financial management, grantee:
Allowances and reimbursements for members of policy making bodies, 57889
Non-Federal share contribution; eligibility for waiver of increase; FY 1978 grants, 19394
Non-Federal share waiver criteria, 52438, 58376
Grantees, funding, 12859
Emergency Energy Assistance Program; approval of grant contract actions, 55247
Federal Register; grantee access to publications, 44533
Program account structure; procedures and description, 24842
Refunding, denial of application, 29123
Personnel management, grantee:
Salary limitation increase, 57890, 59844
Travel per diem rates for grantees and delegate agencies, 10912
Uniform Federal standards; Lettter-of-Credit amount reduction, 44532

**PROPOSED RULES**

Citizen participation grants program; establishment, 26079, 29017
Community action programs:
Boards and committees of Title II programs; establishment and eligibility, 55263
Grantee boards, 26274
Community food and nutrition program, 21016, 21904
Economic development programs; small business programs funded by community development corporations, 35511
Grantees, funding:
Due process rights for applicants denied benefits, 58393
Nondiscrimination:
Handicapped in federally-assisted programs, 28758, 36489
Personnel management, grantee
Policy statements; inquiry, 53474
Uniform Federal standards; Letter-of-Credit amount reduction, 25698

**NOTICES**

CAP incentive projects; waiver of non-federal share requirement, 53492
Crisis Intervention Program, Special; reprogramming funds, 1816
Emergency energy assistance program:
Funding declarations, 12904, 13091, 14347, 14533, 15352, 17390, 19061, 20030, 22229
Non-Federal share requirement waiver, 37735
Reopening and availability of funds, 54115
Grantees; Economic Opportunity Amendments of 1978, compliance information, 55274
Improving Government regulations, 22595, 58401
Meetings:
National Consumer Cooperative Bank Federal Agency Task Force, 53791, 54118
Privacy Act; systems of records; annual publication, 42116
Rural capacity for assistance and planning project; non-Federal share requirement, waiver, 34183
Summer Youth Recreation Program; application notice, 18739


## COMPTROLLER OF CURRENCY


**RULES**

Application procedures, supplemental, for charters, branches, mergers and relocations:
Community reinvestment, 47156
Community reinvestment, 47146
Fiduciary powers; National banks and collective investment funds:
Financial reports, annual and quarterly; equity securities; rescission, 23991
Trust department decisions; securities sale, prohibition of inside information use, 6759
Flood hazard areas; loans by National banks, 7418
Rulings:
Charitable contributions, 19832
Loans secured by real estate, 43291
Securities Exchange Act disclosure rules; conformance with SEC, 60537
Supensions and prohibitions where felony charged; procedures and standards, 21868

**PROPOSED RULES**

Community reinvestment, 29918
Community reinvestment; geographic proximity and military personnel, 57259
Fiduciary powers; National banks and collective investment funds:
Securities transactions, trust department accounts and customers; uniform procedures and records, 5004, 13889
Trust assets investment; variable amount notes, etc.; suspended, 25348
Financial institutions; credit needs of local communities, assessment; hearings, 3370, 7243, 13074
Recordkeeping and confirmation requirements; transactions effected by National banks, 50917
Rulings:
Bank indebtedness; leasing transactions, 2731
Bank premises or holding corporation stock, investment, 2732
Loans secured by real estate, 6801, 43310
Loans to foreign governments, agencies, and instrumentalities, 1800
Real estate owned, 2881, 41406
Securities Exchange Act disclosure rules; conformance with SEC, 10375, 10938
Suspensions and prohibitions where felony charged; procedures and standards, 3368

**NOTICES**

Authority delegations:
Comptroller, order of succession, 15380
Equal credit opportunity and fair housing; enforcement guidelines, 29256
Fair housing lending enforcement program, meeting, 23780, 56746
Improper payments by banks and bank holding companies, joint policy, 2759
Meetings:
Fair housing lending enforcement program, 23780, 56746
Securities; over-the-counter trading suspension:
Citizens & Southern National Bank, Savannah, Ga., 8657, 9676
Securities; registration applications:
First National Bank of East St. Louis, 39883


## CONSTRUCTION INDUSTRY

*See Employment Standards Administration.*

## CONSUMER PRODUCT SAFETY COMMISSION


**RULES**

Antennas; citizens band base station and television antennas, and supporting structures; warning and instruction requirements, 28397, 47722
Architectural glazing materials; safety standards:
Decorative glazing materials, 57246
Tempered glass, 26700, 50421
Test apparatus and procedures, 43708, 57594
Testing program and certification requirements; oral presentations date change, 2734
Baby rattles; safety requirements, 22005
Bicycles; safety requirements, 60034
Carcinogens in consumer products, classifying, evaluating and regulating; interim policy and procedure, 25659, 60436
Cellulose insulation; interim safety standard, 35247, 39564
Chlorofluorocarbon propellants, self pressurized (aerosol) consumer products; labeling and data submission requirements, 7983
Conduct standards, 60876
Confidential information, safeguarding procedures:
Chemical formulations; procedure revisions, 49532
Flammable fabrics:
Children's sleepwear; sizes O-6X and 7-14; flame retardent chemicals, reduction, 4853
Hazardous products; banned:
Paint, lead-containing; exemption for metal furniture, 8514
Hazardous substances and articles; administration and enforcement:
Baby rattles; banning and safety standards, 22005
Cyanoacrylate-based glue; labeling requirements exemption, 32745
First aid directions for inducing vomiting, 33704
Toys; technical requirements for determining sharp metal or glass edges, 12645, 21324

Vinyl chloride monomer, self-pressurized; household substances containing, 12310, 22936
Writing instrument cartridges; exemption from labeling requirements, 47176
Matchbooks, safety standards, 53709
Meetings; public notice, attendance, and recordkeeping:
Confidential procurement and potential litigation matters; pre-proposal conferences; advance notice requirements exemption, 5804
Organization and functions:
Toxicological Advisory Board, 60876
Participants in rulemaking proceedings, financial compensation; policies and procedures, 23562
Poison prevention packaging:
Aspirin-containing powders; child-resistant packaging, 17332
Iron preparations; child-resistant packaging, 17336
Prescription drugs distributed to pharmacies; child-resistant packaging, 11980
Policy or interpretation statements:
Child-resistant packaging in large containers, 53712
Emergency exemptions, granting, 19216
Refuse bins, unstable; banned hazardous product; petition denied and statement of enforcement policy, 26284
Substantial product hazard reports; policies and procedures, 34998
Swimming pool slides, safety standards, 58813
Toys, electrically operated, etc.:
Power cord requirements, 45552
Stalled motor testing; policy and interpretation, 26428
Voluntary standards activities; policy statement, 19221
Voluntary standards organizations, employee membership and participation in; revised policy, 30795

**PROPOSED RULES**

Architectural glazing materials; safety standards; decorated gloss, exemption, 10700
Benzene in consumer products as ingredient or contaminant:
Product ban, 21839, 27852, 47197
Regulatory action under CPSA, 21838, 27852
Cellulose insulation; interim safety standard; inquiry, 39720
Cellulose insulation; labeling requirement, 59390
Christmas tree lights, miniature; safety standards, 2185, 14322, 19136
Flammable fabrics:
Children's sleepwear; sizes 0-6x; exemption withdrawn, 31348
Clothing textiles; guaranties and reasonable and representative tests, 47952
Guaranties and reasonable and representative texts, 47952
Vinyl plastic film; guaranties and reasonable and representative tests, 47952
Hazardous products; banned:
Paint, lead containing; exemption for metal furniture, 1804
Hazardous substances and articles; administration and enforcement:
Benzene; special labeling, 21852, 27852
Labeling requirements for household use substances, 58195
Toys; choking, aspiration or ingestion hazards for children under three years of age, 47684
Lawn mowers, power; safety standards, 24697, 51038, 55771, 60955
Nitrobenzene, products containing; information submission, 24325, 54944
Poison prevention packaging:
Acetaminophen preparations; child-resistant packaging, 4632
Benzene, 21853, 27852
Economic poisons (pesticides) standards; child-resistant packaging; withdrawn, 24698
Methylprednisolone; child-resistant packaging, 47738
Prescription drugs distributed to prescribing practitioners; child-resistant packaging, 12029
Practice rules:
Investigations, inspections, and inquiries, 35440
Space heaters, unvented gas-fired; ban, 6235, 29011, 37713
Space heaters, unvented gas-fired; ban withdrawn, 55772
Substantial product hazards; reporting and notification requirements, policies, and procedures; hearings, 13393, 17972
Toys, electrically operated, etc.:
Choking, aspiration or ingestion hazards for children under three years of age, 47684
Power cord requirements, 10575

**NOTICES**

Architectural glazing materials:
Environmental and impact test procedures; petition denied, 52511
Standard definition; petition denied, 29976
Authority delegations:
Financial compensation of participants in informal rulemaking proceedings, 60987
Beer dispensing systems, CO-2; petition denied, 39409
Bounce fabric softener; petition denied, 5407
Cellulose insulation; interim safety standard; inquiry, 35238
Chain saws; safety standards; petition denied, 26103
Children's wearing apparel containing TRIS, exportation; policy statement, 25711
Chlorofluoroalkanes, fully halogenated; use as propellants in aerosol consumer products; EPA ban, 11326
Chlorofluorocarbons, nonpropellant uses, meeting, 1986
Committees; establishment, renewals, terminations, etc.:
Product Safety Advisory Council et al., 9330, 19701
Consent agreements; provisional acceptance:
Benchmark Carpet Mills, Inc., 34830
Eagle Carpets, Inc., 10615
Kobrin, Harry S., 9633
Southern Bedding Co., Inc., 10615
Ther-A-Pedic of Chicago, Inc., 9633
Electric water heaters; portable immersion:
Complaint filed, 14349
Enforcement proceeding, hearing, 19431, 21346
Electrical extension cords; petition denied, 9632
Electrical service drop wires, insulation; petition denied, 48680
Escalators; safety standards; petition denied, 47236
Eyepiece solar filters; safety standards; petition denied, 43760
Fire extinguishers; safety standards; petition denied, 8172
Flammable Fabrics Act; noncompliance complaints against various companies:
Franzus Co., Inc., et al., 57639
Salem Carpet Mills, Inc. et al., 57641
Spare Parts, 14095
Football helmets, investigation, 9843
Football shoes, petition denied, 9843
Gas furnaces; labeling; petition denied, 1636
Girl's sweatshirts, certain; Flammable Fabrics Act violation; prehearing conference, 20031
Hairdryers, hand-held, and similar products; safety standards; petition denied, 3149
Home insulation; cellulose; mandatory safety standard, proceeding, 10427, 19905
Improving Government regulations; inquiry, 32392
Interagency Regulatory Liaison Group:
Testing standards and guidelines, 1523, 1987
Work plans and meetings, 7174
Matchbooks with front friction; enforcement policy statement, 7998
Meetings:
Chlorofluorocarbons; nonpropellant uses, 1986
Flammable Fabrics Act National Advisory Committee, 11730, 56087
Poison Prevention Packaging Technical Advisory Committee, 17995, 53794
Product Safety Advisory Council, 6992, 23011, 39410, 56702
Unvented gas-fired space heaters, 11731
Upholstered furniture, flammability, 56256
Meetings; Sunshine Act, 60, 1047, 1581, 1885, 2812, 3668, 4174, 4175, 4748, 5645, 6195, 9217, 9405, 11036, 11656, 11784, 13656, 19103, 19751, 19752, 20891, 21562, 26877, 26878, 26879, 28081, 28082, 28611, 31303, 32367, 32368, 33873, 35789, 37535, 37536, 40099, 40600, 41158, 41465, 42100, 43083, 49106, 53100, 53101, 55559, 11298A
Poison Prevention Packaging Act; noncompliance complaints against various companies:
Ronson Corp. et al., 60635
Priority projects for Commission action; policy statement, 29744
Recreational vehicles, off-road motorized; safety standards; petiton denied, 3150
Sleds; lead-based paint; enforcement policy, 15352
Tents; flammability; petition denied, 27881
Unvented gas-fired space heaters; meeting, 11731
Upholstered furniture, flammability; meeting, 56256

## CONSUMERS

*See Consumer Product Safety Commission.*
*Federal Trade Commission.*
*National Highway Traffic Safety Administration.*

## COPYRIGHT OFFICE, LIBRARY

## OF CONGRESS

**RULES**

Claims registration:
- Classification of works and application form and content, 966
- Deposit requirements, 767, 11702, 41979
- Renewal of copyright, 964

Copyright owners and broadcasting entities:
- Motion pictures; registration of copyright claims, deposit requirements, 12321, 31133
- Phonorecord players, coin-operated (jukeboxes); recordation and certification, 37453, 50679, 59379
- Phonorecords making and distributing; compulsory license; interim rule, 44517, 54247, 57252
- Recordation of transfers of copyright, 35044

Copyrighted works secondary transmission by cable systems; compulsory license, 960, 27830

Freedom of information, 774

Privacy Act; implementation, 776

Registrations, copyright; import statements and transfer recordation; corrections and amplifications, 772

**NOTICES**

Filing and determination of action, 24151

Performance rights in sound recordings; report, 1655, 11773, 12763

Privacy Act; systems of records, 5113

Privacy Act; systems of records; annual publication, 41165

## COPYRIGHT ROYALTY TRIBUNAL

**RULES**

Broadcasting, noncommercial; use of copyrighted works, 25070

Cable royalty fees; filing of claims, 24528

Cable royalty fees; filing of claims; proof of fixation of works, policies and procedures, 40225

Phonorecord players (jukebox):
- Copyright owner access, 40500
- Royalty fee claims filing, 40501

Procedure rules, 53719

**PROPOSED RULES**

Cable royalty fees; filing of claims, 6263, 19423

Cable royalty fees; filing of claims; proof of fixation of works, policies and procedures, 32825

Equal employment opportunity procedures, 49318

Freedom of information, 49318

Phonorecord players (jukebox):
- Royalty fee access; hearing, 20513
- Royalty fee claims filing; inquiry, 6262, 32826

Privacy Act; implementation, 49318

Procedure rules, 49318, 50473

Sunshine Act; implementation, 49318

**NOTICES**

Meetings; Sunshine Act, 1581, 13162, 18128, 21976, 37332, 50279, 51503

Phonorecord players (jukeboxes):
- Locations, disclosure of information, 53795

## COPYRIGHTED WORKS, NEW TECHNOLOGICAL USES NATIONAL COMMISSION

**NOTICES**

Meetings, 1016, 4465, 6847, 14777, 19080, 20570

Photocopying Subcommittee; draft report; availability for comment, 10983

## COSMETICS

*See Food and Drug Administration.*

## COST ACCOUNTING STANDARDS BOARD

**RULES**

Cost accounting standards:
- Applicability, exemptions and waivers, 24820
- Compensation, deferred costs; correction, 24821
- Contracts and subcontracts awarded to foreign governments; exemptions, 52694
- Defense prime contract and subcontracts, negotiated; contract clause changes; etc., 9781, 16149
- Insurance cost accounting, 42244

Disclosure statement:
- Defense prime contracts and subcontracts, negotiated; contract clause changes; etc., 9781

Procurement practices; contract coverage:
- Applicability, exemption, and waiver, 24819
- Defense prime contracts and subcontracts, negotiated; contract clause changes, etc., 9779, 16149

**PROPOSED RULES**

Cost accounting standards:
- Allocation of indirect costs, etc., 11118
- Contract coverage; educational institutions; negotiated defense contracts, exemption, 10699
- Contract coverage; foreign concerns, 33252
- Independent research and development and bid and proposal costs, 32812
- Insurance costs accounting, 20806, 22043

Procurement practices; contract coverage:
- Educational institutions; negotiated defense contracts, exemption, 10699
- Foreign concerns, exemption, 33252

**NOTICES**

Meetings, 6992, 36676

## COUNCIL ON ENVIRONMENTAL QUALITY

*See Environmental Quality Council.*

## COUNCIL ON WAGE AND PRICE STABILITY

*See Wage and Price Stability Council.*

## CUSTOMS SERVICE

**RULES**

Administrative rulings:
- Implementation of statutory requirements, 49792, 55758

Air commerce:
- Bond requirement waiver; unloading operations, 14962
- Felts Field, Spokane, Wash.; international airport status revoked, 28456
- Technical changes, 13060

Alcoholic beverages and tobacco product imports, 43454

Antidumping:
- Carbon steel plates from Japan, 22937
- Clear sheet glass from France, 31003
- Clear sheet glass from West Germany, 52023
- Disclosure conferences during full-scale investigations, 11982, 14456
- Elemental sulphur from Mexico, 955
- Large power transformers from Switzerland, 32293
- Polyvinyl chloride sheet and film from Republic of China, 28457
- Railway track maintenance equipment from Austria; ballast regulators and tampers, 6937
- State-controlled-economy countries, merchandise from, 35265, 40804
- Steel wire strand for prestressed concrete from Japan, 57599
- Viscose rayon staple fiber from Belgium, 55240

Articles conditionally free, subject to reduced rate, etc.:
- Alcoholic beverages and tobacco product imports, 43453
- Antiques, 4856
- Guyana aircraft; duty and tax exemptions on certain supplies and equipment, 3358
- Implementation of statutory requirements, 49787
- Race horses, temporarily exported and returned, 23709
- Technical changes, 13060, 20003

Carriers, cartmen, and lightermen:
- Bond requirements, 36057
- Container merchandise in bond; transportation, 31316

Country of origin marking:
- Technical changes, 13061

Court decisions adverse to Customs Service; compliance after publication of acquiescence, 38818

Customhouse brokers:
- Incidental services; charges, 41193
- Office title change, use of microfiche, etc., 21878, 23565, 34454
- Technical changes, 13061

Customs bonds, foreign landing certificates, 59288

Customs warehouses, merchandise control:
- Distilled spirits exportation, 38382
- Establishing bonded warehouse, 10685

Drawback:
- Alcoholic beverages and tobacco product imports, 43455
- Claims; accelerated payment, 22176
- Technical changes, 13061

Entry of merchandise:
- Alcoholic beverages and tobacco product imports, 43455
- Implementation of statutory requirements, 49787
- Steel articles, special invoice, 6065, 11815

Fines, penalties, and forfeitures:
- Disclosures, voluntary; violations of customs laws, 23712
- Notices of alleged violation information and prepenalty notices, 4255

General provisions:
Technical changes, 13061
Inspection, search, and seizure:
Fine, penalty, forfeiture and prepenalty notices, 4255
Implementation of statutory requirements, 49791
Petitions for relief from fines, penalties, or seizure, 4595
Technical changes, 13062
Liquidation of duties; countervailing duties:
Alcoholic beverages and tobacco product imports, 43455
Bottled olives from Spain; net amount of bounty, 25813
Butter cookies from Denmark, 955, 956
Carbon steel plate and high strength steel plate from Mexico, 50171
Chain of iron or steel from Japan, 37686
Chains and parts of iron or steel from Spain, 3259
Fish from Canada, 25995, 25996, 50676
Handbags, leather, from Uruguay, 3904, 3905
Handbags from Columbia, 18660
Implementation of statutory requirements, 49791
Leather wearing apparel from Uruguay, 23710, 23711
Non-rubber footwear footwear from Uruguay, 3904, 3907
Non-rubber footwear footwear handbags; and leather wearing apparel from Uruguay, 52485
Non-rubber footwear from Spain; net amount of bounty, 25815
Sugar from European Community, 33237
Sugar-containing articles from Australia, 17352
Textiles and textile products from Argentina, 53421
Textiles and textile products from Brazil, 53423, 53426
Textiles and textile products from Uruguay, 53424
Tires, x-radial steel belted, from Canada, 1791
Unwrought zinc from Spain; calculation of net amount of bounty or grant, 25814
Mail importations:
Alcoholic beverages and tobacco product imports, 43455
Examination of letter mail, 14454
Implementation of statutory requirements, 49788
Technical changes, 13061
Merchandise, cartage and lighterage; payment of unclaimed merchandise, 23566
Merchandise, special classes:
Alcoholic beverages and tobacco product imports, 43454
Motor vehicles and equipment, 56659
Pre-Columbian monumental or architectural sculpture or murals; importation prohibition, 36055
Technical changes, 13060
Merchandise lost, damaged, abandoned, or exported; relief from duties, 53713, 54925
Organization and functions; field organization; ports of entry, etc.:
Bar Harbor, Maine, 19833
Corpus Christi, Tex., 19833
Duluth, Minn., 19833
El Paso, Tex., 28456
Fairport Harbor, Ohio, 18659
Freeport, Bahamas and Calgary, Alberta; preclearance offices, 36056
Los Angeles, Calif., 19833
Morris County, N.J., 19833
Point Roberts, Wash., etc., 36055
Puget Sound, Wash., 30289, 31129
Packing and stamping, marking; alcoholic beverages and tobacco product imports, 43454
Personal declarations and exemptions:
Implementation of statutory requirements, 49788, 55758
Technical changes, 13061
Protests:
Implementation of statutory requirements, 49791
Judicial review of administrative decisions, 1938
Technical changes, 13062
Quotas; time conversion procedure, 29112
Relations, customs, with insular possessions and Guantanomo Bay Naval Station:
Technical changes, 13060
Transportation in bond and merchandise in transit:
Technical changes, 13061
Vessels in foreign and domestic trades:
Barges, non-self-propelled, of Swedish registry; reciprocal privileges, 58814
Cargo declaration forms; arrival or departure of vessels; effective date delayed, 36622, 60273
Cayman Islands, German Democratic Republic, and United Arab Emirates; special tonnage tax and light money, 22173
Fee schedule for vessel services, 46963
Implementation of statutory requirements, 49787
Individuals boarding or leaving vessels without Customs permission; categories, 22174
Surinam Republic and Iatar, suspension of tonnage tax and light money, 24670
Technical changes, 13059
Tonnage tax and light money, 54234
Warehouse and rewarehouse entries and withdrawals:
Alcoholic beverages and tobacco product imports, 43455
Distilled spirits; exportation, 38382
Technical changes, 13061
Warehouses, container stations, etc.
Alcoholic beverages and tobacco product imports, 43454

**PROPOSED RULES**

Administrative review
Merchandise, entry of and liquidation of entries, 55781, 60291
Administrative rulings:
Research and development costs, "pirated" or "stolen"; dutiable status, 41236
Watches and watch movements, "manufactured or produced" requirements; duty treatment; change of practice, 57921, 58574
Air commerce:
Akron Municipal Airport, Akron, Ohio; international airport status revoked, 46981
Customs and navigation laws, penalties, 53453
Exportation of livestock by aircraft and vessels; inspection certificate, 23731
Felts Field, Spokane, Wash.; international airport status revocation, 1963
Foreign-registered aircraft; permits to proceed; withdrawal, 40238
Antidumping:
Deposit of estimated dumping duties and use of best information available, 58384
Disclosure conferences during full-scale investigations, 1099
Petitions, filing requirements modifications, 1358
State-controlled-economy countries, merchandise from, 1356, 4871
Appraisement and informal entries:
Merchandise, entry of and liquidation of entries, 55781, 60291
Articles conditionally free, subject to a reduced rate, etc.:
Customs and navigation laws, penalties, 53453
Merchandise, entry of and liquidation of entries, 55781, 60291
Country of origin marking:
Radios, stereo systems, television sets, etc.; change of position relating to marking; withdrawn, 7447
Customhouse brokers:
Recordkeeping reports, trademarks, and disposition of forfeited distilled spirits, etc.; procedural reform, 53461
Customs relations with Canada and Mexico:
Customs and navigation laws, penalties, 53453
Vehicle and vessel manifest discrepancies; handling procedures, 32817
Drawback claims; rates, 3286
Entry of merchandise:
Footwear; invoice requirements, 32819
Merchandise, entry of and liquidation of entries, 55781, 60291
Steel; invoice, producer and price information, 47543
Entry process:
Merchandise, entry of and liquidation of entries, 55781, 60291
Financial and accounting procedure:
Seals; car, compartment, and package; new applications for approval, suspended, 1806
Fines, penalties, and forfeitures:
Customs and navigation laws, penalties, 53453
Foreign-trade zones:
Processing costs, nonprivileged merchandise; appraisement exclusion; advance notice, 45885
General order, unclaimed, and abandoned merchandise:
Merchandise, entry of and liquidation of entries, 55781, 60291
Inspection, search, and seizure:
Customs and navigation laws, penalties, 53453
Recordkeeping reports, trademarks, and disposition of forfeited distilled spirits, etc.; procedural reform, 53461
Liquidation of duties; countervailing duties:
Merchandise, entry of and liquidation of entries, 55781, 60291
Organization and functions; field organization; ports of entry, etc.:
El Paso, Tex., 11587
Point Roberts, Wash., 22752
Puget Sound, Wash., etc., 58383
Saulte Ste. Marie, Mich., etc., 36108

Packing and stamping; marking:
Merchandise, entry of and liquidation of entries, 55781, 60291
Recordkeeping reports, trademarks, and disposition of forfeited distilled spirits, etc.; procedural reform, 53461
Personal declarations and exemptions:
Recordkeeping reports, trademarks, and disposition of forfeited distilled spirits, etc.; procedural reform, 53461
Quotas:
Merchandise, entry of and liquidation of entries, 55781, 60291
Relief from duties on merchandise lost, damaged, abandoned, or exported:
Merchandise, entry of and liquidation of entries, 55781, 60291
Trademarks, trade names, and copyrights:
Recordkeeping reports, trademarks, and disposition of forfeited distilled spirits, etc.; procedural reform, 53461
Vessels in foreign and domestic trades:
Customs and navigation laws, penalties, 53453
Exportation of livestock by aircraft and vessels; inspection certificate, 23731
Foreign repairs to, and equipment purchased for, American vessels, 14060, 19417, 21693
Warehouse and rewarehouse entries and withdrawals:
Merchandise, entry of and liquidation of entries, 55781, 60291

NOTICES
Administrative decisions, unpublished; biweekly lists; availability, 26511
Administrative decisions, unpublished; biweekly lists; availability on microfiche, 45931
Antidumping:
Carbon steel wire rod from United Kingdom; extension of time, 27938
Golf cars from Poland, 58877
Impression fabric of man-made fiber from Japan, 22345
Man-made fiber from Japan, 7389
Polyvinyl chloride sheet and film from Republic of China, 8898
Portland hydraulic cement from Canada, 58129
Silicon metal from Canada, 6350
Sorbates from Japan, 37052
Authority delegations:
Assistant Commissioner (Regulations and Rulings); court decisions, 16234
Countervailing duty petitions and preliminary determinations:
Amoxicillin trihydrate from Spain, 40332
Ampicillin trihydrate from Spain, 22479, 55512
Bicycle tires and tubes from Korea, 7495, 32910
Bicycle tires and tubes from Republic of China, 7494, 32912
Bromine and brominated compounds from Israel, 24395, 56746
Chains of iron or steel from Japan, 5127
Diuron from Israel, 24396, 33860
Electrical sound equipment and electronic musical instruments from Japan, 8898, 42328
Fish from Canada, 3786, 29637
Footwear from India, 18807, 55028
Grain oriented silicon electrical steel from Italy, 17560
Leather wearing apparel from Uruguay, 3974
Oleoresins from India, 21087, 55512
Oleoresins from Spain, 12418, 39466
Optic liquid level sensing systems from Canada, 3453, 25512
Papermaking machines and parts from Finland, 15825, 38657
Sugar from European Community, 28599
Textiles and textile products from Argentina, 3963, 23781, 47340, 55028
Textiles and textile products from Brazil, 3964, 23783, 47340, 55028
Textiles and textile products from Colombia, 3968, 23786, 47340, 53525, 55028
Textiles and textile products from India, 3970, 23788, 47340, 53526, 55028
Textiles and textile products from Korea, 3972, 23791, 47340, 53527, 55028
Textiles and textile products from Malaysia, 38479, 47340, 55028
Textiles and textile products from Mexico, 38482, 47340, 55028
Textiles and textile products from Pakistan, 38485, 47340, 55028
Textiles and textile products from Philippines, 3975, 23793, 47340, 53528, 55028
Textiles and textile products from Republic of China, 3966, 23785, 47340, 53524, 55028
Textiles and textile products from Singapore, 38489, 47340, 55028
Textiles and textile products from Thailand, 38492, 47340, 55028
Textiles and textile products from Uruguay, 3977, 23795, 47340, 55028
Viscose rayon staple fiber from Sweden, 27631
Court decisions adverse to Customs Service; compliance, 57208
Customhouse broker license suspensions:
Mena, Mark A., 43082
Customhouse broker's examination, October 1978; rescheduling, 26814
Duty-free treatment revocation petition:
Chlorobenzilate, technical, from Israel, 1578
Generalized system of preferences; duty free entry of certain merchandise from designated developing countries; petitions:
Chlorobenzilate, technical, from Israel; withdrawal, 14563
Disposable butane lighters; inquiry, 30382
Diuron wettable powder, 26177
Microscope slides and micro cover glasses; inquiry, 9911
Wire mesh fabric from Mexico; receipt, 14562
Immediate Delivery Application Form 3461; availability and price, 16586
Instruments of international traffic:
Steel kegs for transportation of tin and lead ingots, 58244
Tanks for transportation of apple juice, 27938
Tray units, plastic, for transporting bobbins, 2253
Marketing agreements:
Non-rubber footwear from Hong Kong, certification, 50394
Reimbursable services; excess cost of preclearance operations, 4893, 6350, 21390, 36337
Tariff classification petitions:
Battery-operated clock movements; inquiry, 36548, 42327
Bicycle reflectors, wide angle, 14562, 20886
"Blue jeans," ornamented, 34236, 39624, 46108
Disposable butane lighters; petition, inquiry, 30382
Lasted leather footwear uppers; inquiry, 39465, 52321
Men's or boy's cotton suits, not knit, 2028, 11638
Metal from United Kingdom, 5449
Microscope slides and micro cover glasses, 9911
Wide angle bicycle reflectors, 57999
Tariff-rate quotas:
Fish, 16587
Potatoes (white or Irish), 59196
Tuna fish, canned (classifiable), 20886
Trade name recordation applications:
Aurora Steel Products, 9911, 18808
Dawn Imports International, Inc., 9911, 18808
Fort Incorporated, 55029
Soccer Sport Supply Co., Inc., 29391, 32009

## DEFENSE CIVIL PREPAREDNESS AGENCY

RULES
Consolidated grants to insular areas, 39777
Contributions for civil defense equipment, 25093
Insigne, 26569
Surplus personal property, Federal; donation; CFR Part deleted, 6229

PROPOSED RULES
Consolidated grants to insular areas, 26335
Identification for Federal employees, reservists, and non-Federal support personnel; CFR Part deleted, 5389
Insigne, 10940, 13588

NOTICES
Authority delegations:
Prior delegations withdrawn, 32450
Privacy Act; systems of records, 30331

## DEFENSE COMMUNICATIONS AGENCY

NOTICES
Meetings:
Scientific Advisory Group, 36504, 45429, 52759
Privacy Act; systems of records, 16365

## DEFENSE CONTRACT AUDIT AGENCY

NOTICES
Privacy Act; systems of records, 13605

## DEFENSE DEPARTMENT

*See also Air Force Department.*
*Army Department.*
*Defense Civil Preparedness Agency.*
*Defense Communications Agency.*
*Defense Intelligence Agency.*
*Defense Investigative Service.*

*Defense Logistics Agency.*
*Defense Mapping Agency.*
*Defense Nuclear Agency.*
*Engineers Corps.*
*Navy Department.*

**RULES**

American National Red Cross and USO employees, assignment to duty with armed forces, 12680, 17354
Armed forces, correspondents accompanying; CFR Part removed, 26310
Blind; vending facility program on Federal property, 25339
Charters:
Defense Advances Research Projects Agency; purpose, mission, etc., 32757
Defense Contract Audit Agency; purpose, mission, etc., 32755
Defense Logistics Agency; purpose, mission, etc., 32759
Defense Mapping Agency; purpose, mission, etc., 56895
Defense Security Assistance Agency, 57875
Director, Defense Communications Agency; purpose, mission, etc., 52231
Director, Defense Investigative Service, 52228
Commercial products, acquisition and distribution (ADCP), 57874
Contracting:
Defense acquisition regulatory system, 15150
Contractors receiving negotiated contract awards, $10 million or more, 1617
Contracts, selected acquisition; performance measurements, 16975
Credit unions serving DOD personnel, 1066
Directives, instructions and indices; availability to public, 16478
Discharge Review Boards; procedures and standards, 13568
Engineering for transportability, 3560
Equal opportunity in off-base housing; complaint inquiry/investigative procedures, reporting requirements, etc., 23569
Explosive safety board (DDESB); establishment, procedures, etc., 12678
Foreign indebtedness, collecting and reporting; procedures, 11197
Human/race relations, education and training for military personnel, 58083
Law enforcement; wiretapping, etc., 39988
Medical malpractice claims against armed forces military and civilian personnel, 15148
Metric system of measurement, use, 4009
Off-road vehicles; use on DOD land, 14650
Paternity claims and adoption proceedings involving armed forces members and former members; fathers of illegitimate children, 15149
Periodicals; publication policies, criteria, and controls, 8137
Personnel:
Chaplains for armed forces, nomination, 4856
Interception of wire and oral communications for law enforcement purposes, 39988
Private organizations on DOD installations; proper conduct of operations, 58084
Procurement, adoption of ASPR; availability, 51391
Removal of obsolete CFR parts, 55334
Research grants and title to equipment purchased, 21326
Simplification of regulations, 36245
Uniformed Services University of Health Sciences:
Procedures and delegations, 46531

**PROPOSED RULES**

Active duty; certificate of release or discharge, 30828
Civilian or contractual personnel; determinations of active duty and discharge, 40884
Discharge Review Boards; procedures and standards, 2634, 7932, 8240
Intergovernmental Personnel Act Programs:
Personnel administration merit system; standards, 20996
Personnel:
Indebtedness; processing of claims, 17838, 23001
Ready reserve, screening, 38430
Procurement regulations on organizational conflicts of interest; Federal Procurement Policy Office proposal; inquiry, 47480
Records; user charges, 8271

**NOTICES**

Civilian Health and Medical Program of Uniformed Services (CHAMPUS); termination of cost-sharing for orthodontic treatment, 43761
Committees; establishment, renewals, terminations, etc.:
Defense Advisory Committee on Women in the Services, 45430
Defense Science Board, 45431
Defense Systems Management College Board of Visitors, 45430
Joint Strategic Target Planning Staff Scientific Advisory Group, 45431
National Defense University and Defense Intelligence School Boards of Visitors, 20533, 45431
Scientific Advisory Group on Effects, 45430
Wage Committee, 45430
Discharge Review Boards:
Index modification, 47237
Quarterly index, procedures, 54680
Uniform standards and procedures, 8000
Federal regional council liaison officers; list, 41256
Floodplain management, construction criteria, 9194
Improving government regulations, 21994, 56088, 56090
Medical care, reimbursement rates; 1979 FY, 43540
Meetings:
Armed Forces Epidemiological Board, 1378
Board of Visitors for National Defense University and Defense Intelligence School, 37210, 50236
Defense Intelligence Agency Advisory Committee, 58113, 59420
Defense Systems Management College Board of Visitors, 14097, 44878
Electron Devices Advisory Group, 3152, 5408, 8578, 10616, 11249, 12905, 13606, 17391, 23754, 23755, 24568, 26773, 27884, 37479, 37480, 38452, 43761, 43762, 43763, 45430, 49349, 50955, 53493, 55277, 56702, 58113, 59870, 59871
Military Compensation, President's Commission, 1118, 2205
Science Board Advisory Committee, 3153, 15178, 29025, 39605
Science Board task forces, 31, 1379, 2425, 2751, 6831, 7685, 8000, 8173, 9515, 9516, 10433, 12361, 13605, 14714, 15481, 16798, 17857, 19064, 19906, 20031, 21030, 21714, 22233, 23755, 25712, 26346, 26773, 27884, 32450, 34184, 35091, 38741, 38742, 40276, 47605, 49349, 50013, 53795, 54679, 59420, 59421, 59539
Scientific Advisory Group, 1379
Wage Committee, 2652, 4913, 9634, 15179, 19704, 25712, 30851, 34522, 41256, 46563, 54680, 59421
Women in Services Advisory Committee, 7249, 11248, 34184, 44563
Meetings; Sunshine Act, 1432, 9219, 18401, 38784, 51197, 61084
Military Compensation, President's Commission; Privacy Act; systems of records; revocation and transfer, 13421
Organization and functions:
Defense Mapping Agency, 40051
Science Board; addition of member, 34183
Science Board; continuance, 34183
Privacy Act; systems of records, 1524, 2653, 2751, 8002, 13090, 13421, 19906, 26473, 29600, 30330, 33876, 34936, 34979, 34982, 34984, 43539, 56703, 58405, 60331
Privacy Act; systems of records; annual publication, 42374
Regulatory agenda; semiannual, 56088

## DEFENSE INTELLIGENCE AGENCY

**RULES**

Privacy Act; implementation, 3275, 31130

**PROPOSED RULES**

Privacy Act; implementation, 24711

**NOTICES**

Committees; establishment, renewals, terminations, etc.:
DIA Advisory Committee, 45429
Meetings:
Scientific Advisory Committee, 1637, 3610, 6305, 7249, 10970, 14097, 15178, 17995, 19273, 20533, 34830, 46999, 50731, 52760
Privacy Act; systems of records, 24352

## DEFENSE INVESTIGATIVE SERVICE

**RULES**

Privacy Act; implementation, 25672, 26720

**PROPOSED RULES**

Privacy Act; implementation, 19689

**NOTICES**

Privacy Act; systems of records, 19701

## DEFENSE LOGISTICS AGENCY

**RULES**

Motor vehicles, privately owned; registration, 40806
Procurement, 18993

**NOTICES**

Privacy Act; systems of records, 2751, 40902

## DEFENSE MAPPING AGENCY

**NOTICES**

Privacy Act, systems of records, 58404

## DEFENSE NUCLEAR AGENCY

**NOTICES**

Meetings:
Scientific Advisory Group, 1523, 28532, 59539
Privacy Act; systems of records, 6829, 16366

## DELAWARE RIVER BASIN COMMISSION

**RULES**

Basin regulations:
Water quality standards; incorporation by reference, 27784
Water supply charges, 56655
Practice and procedure rules:
Wetlands protection policy, 38816

**NOTICES**

Comprehensive plan, congressional proposals, etc.; hearings, 29602
Comprehensive plan, sewage treatment plant projects; hearings, 2754, 11249, 15768, 21926, 26773, 31059
Comprehensive plan, water supply and sewage treatment plant projects; hearing, 48681
Environmental statements, availability, etc.:
Dow Chemical Co., 43063
Merrill Creek Reservoir Project, 13091
Water resources program, etc.; hearing, 41420
Wetland protection policies; hearing, 19431

## DISASTER ASSISTANCE

*See Agency for International Development.*
*Farmers Home Administration.*
*Federal Crop Insurance Corporation.*
*Federal Disaster Assistance Administration.*
*Federal Insurance Administration.*
*Small Business Administration.*

## DISEASE CONTROL CENTER

**RULES**

Grants:
Influenza immunization, 52707
Quarantine, foreign:
Bacillus anthracis in lather brushes; elimination of testing requirements, 53039

**PROPOSED RULES**

Coal mine health and safety:
Noise standards; dosimeter usage, 3729, 16349
Coal miners, underground; medical examinations of; chest roentgenographic, 17979
Grants:
Childhood immunization, urban rat control, and VD control programs, 27210
Lead-based paint poisoning; grants for prevention, 35073
Noise dosimeter sets, personal; certification; correction, 1968
Quarantine, foreign:
Bacillus anthracis in lather brushes; elimination of testing requirement, 12338, 27215

**NOTICES**

Advisory committees, annual reports, availability, 43553, 56102
Committees; establishment, renewals, terminations, etc.:
Childhood Lead-Based Paint Poisoning Prevention ad hoc Advisory Committee, 42306
Immunization Practices Advisory Committee, 17540
Mine Health Research Advisory Committee, 61007
Programs and Policies Advisory Committee, 2940, 21726
Safety and Occupational Health Study Section, 46079
Gonococcal infections; meeting, 50247
Influenza, status; meeting, 31237
Measles elimination, practical aspects; meeting, 53822
Meetings:
Beryllium, carcinogenicity, 45644
CDC Programs and Policies Advisory Committee (ad hoc), 11265
Coal Mine Health Research Advisory Committee, 14736, 20555
Gonococcal infections, 50247
Immunization Practices Advisory Committee, 16412, 25192, 40546, 59551
Influenza, status, 31237
Measles elimination, practical aspects, 53822
National Institute for Occupational Safety and Health study section, 20555, 40924, 47614
Programs and Policies Advisory Committee, 2941, 7026, 21050
Safety and Occupational Health Study Section, 11265
Stress reduction approaches evaluation, 59551
Tuberculosis therapy, 50247
Occupational health research studies, 1979 FY; inquiry, 55469
Occupational safety and health field research project; carbon disulfide exposure, 59442
Occupational safety and health field research projects; list, 29834, 42306
Occupational safety and health standards:
Chemical and physical agents; exposure levels, safe standards for employment; inquiry, 30898
Chemical and physical agents and industrial processes; exposure levels, safe standards for employment; inquiry, 15197, 30897
Mining industry; health standards development, priorities; inquiry, 45646
Spirometry training course approval, 58119
Privacy Act; systems of records, 41088
Stress reduction approaches evaluation; meeting, 59551
Tuberculosis therapy; meetings, 50247

## DISEASES

*See Animal and Plant Health Inspection Service.*
*Disease Control Center.*
*National Institutes of Health.*

## DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY

*See Redevelopment Land Agency.*

## DOMESTIC AND INTERNATIONAL BUSINESS ADMINISTRATION

*See Industry and Trade Administration.*

## DRUG ENFORCEMENT ADMINISTRATION

**RULES**

Administrative functions, practices and procedures:
Hearings; Administrative Law Judge; response to order to show cause, extensions of time, 26428
Schedules of controlled substances:
Difenoxin in combination with atropine sulfate, 38383
N-Ethyl-1-phenylcyclohexylamine and 1-(1-phenylcyclohexyl)pyrrolidine, 43295
Exempt chemical preparations, 18172
Medigesic Plus, 44839
Phencyclidine, 3359
1-Phenylcyclohexylamine and 1-piperidinocyclohexanecarbonitrile, 21325

**PROPOSED RULES**

Piperidine reporting and purchaser identification, 57922
Schedules of controlled substances:
Difenoxin in combination with atropine sulfate, 27560
N-Ethyl-1-phenylcyclohexylamine and 1-(1-phenylcyclohexyl)pyrrolidine, 35734
Medigesic Plus, 34503
Pentazocine, 40884
1-Piperidinocyclohexanecarbonitrile and 1-piperidinocyclohexylamine, 11589

**NOTICES**

Meetings:
Peyote, legitimate distribution to members of Native American Church, 56106
Registration applications, etc.; controlled substances:
Abbott Laboratories, 35124, 46388
Almar Pharmacy, 36520, 38747
Applied Science Laboratories, Inc., 35123, 35124, 46388, 50510
Arenol Chemical Corp., 29632, 38747
Argon Research Corp., 22461, 27260, 27909, 31441, 35560
Bennett, Thomas Edward, D.O., 43571
Berwick, Robert C., M.D., 19470
Blanton, Frederick Marsh, M.D., 6169, 27616
Bridwell, Malcolm E., M.D., 3955
Ciba-Geigy Corp. et al., 43571, 54704
Cilento, Raphael C., M.D., 14749
Clark, Frank B., M.D., 26145
Collaborative Research, Inc., 36524, 48086
Eli Lilly & Co., 43571, 47617
Endo Laboratories, Inc., 47617
FOS Pharmaceutical Co., Inc., 36521
Fher Corp. Ltd., 38474, 48725
Ganes Chemicals, Inc., 9380, 17874
Godorov, Joseph J., D.O., 36702
Grega, Stephen J., M.D., 19726, 45653
Halpern, David B., 5079
Hoffman LaRoche Inc., 2019
Jackson, Roosevelt P., M.D., 6664, 25196
Klinestiver, Donald G., M.D., 16555, 48085
Knauf & Tesch Co., 5439, 15503
Knoll Pharmaceutical Co., 1410, 8861
Langston, Bernard L., III, M.D., 48724
Lax, Aaron, M.D., 18345
Lozano, Armand, M.D., 11618
M. B. H. Chemical Corp., 15019
Mallinckrodt Inc., 8861, 17874
MBH Chemical Corp., 5079
McNeilab, Inc., 27908, 27909, 35403

Merck Chemical Manufacturing Division, 5080
Merck & Co., Inc., 15018
Moore, John W., Jr., M.D., 36522, 38747
National Institute on Drug Abuse, 35123, 44911
Ostergaard, Jack F., M.D., 48724
Parke, Davis & Co., 17874
Penick Corp., 17875
Philadelphia Seed Co., 2019
Pointer, Joseph J., M.D., 31442
Prendergast, Thomas R., 47017
Regis Chemical Co., 19470, 28259
Rosen, Isadore I., M.D., 14748
Sarmiento, Maximo R., M.D., 19726, 36523
Sendin, Andres Sanchez, M.D., 6846
Smurthwaite, Alfred Tennyson, N.D., 11873
Snapp, Landon Boyce, II, M.D., 2943
Stepan Chemical Co., 15019
Stephan Chemical Co., 24749, 24750
Sterling Drug, Inc., 46388
Turner, Carlton, 5079
Twelve Oaks Tower Pharmacy et al., 46085
U.S. Pharmacopeial Convention, Inc., 34547, 46388
White, Herman Winfield, D.O., 6665
Whitenight, John W., D.O., 17545, 28259
Winthrop Laboratory, 34547
Wyeth Labs., Inc., 28259, 36524
Schedules of controlled substances; production quotas:
Amphetamine, 23021
Ecgonine, 27909
Phenmetrazine, 6169, 7488, 8307
Schedule II, 1978 aggregate, 35758, 41440, 50974
Schedules I and II, 1978 aggregate, 11765, 20565, 24386
Schedules I and II, 1979 aggregate, 46085, 55828
Thebaine, 44911, 52301

## DRUGS

*See Alcohol, Drug Abuse, and Mental Health Administration.*
*Drug Enforcement Administration.*
*Food and Drug Administration.*

## ECONOMIC ANALYSIS BUREAU

### RULES

Direct investment surveys; correction, 2169
Direct investment surveys; treatment of trusts, 54624

### PROPOSED RULES

Direct investment surveys:
Reporting requirements, mandatory, 58194
Treatment of trusts, 43724
Foreign direct investment in U.S.; surveys; mandatory reporting requirements, 22053

### NOTICES

Improving Government regulations; inquiry, 23176

## ECONOMIC DEVELOPMENT ADMINISTRATION

### RULES

Economic development, special, and adjustment assistant grants:
Award and use of grants, etc., 8253
Project modification policy, 3350
Economic development district organization; representation requirement, 18541, 44473
Financial assistance requirements:
Labor standards for construction projects, 54924, 56220
Lead-based paint on projects assisted by EDA; restrictions on use, 15148
Non-relocation requirements, 8507
Project modification policy, 3350
Relocation assistance, 8254
Firms and communities, adjustment assistance:
Project modification policy, 3350
Public works and development facilities program:
Grant rates, maximum, 13369

### PROPOSED RULES

Financial assistance requirements:
Labor standards for construction projects, 41408
Public works and development facilities program:
Grant rates, maximum, 47980
Special economic development and adjustment assistance; advance notice, 52432, 57918

### NOTICES

Adjustment assistance eligibility, industry producing firm studies:
Bolts, nuts, and large screws of iron or steel, 6984
Citizens Band (CB) radio transceiver, 12359
High-carbon ferrochromium industry, 6985
Unwrought, unalloyed copper industry, 50953
Unwrought, unalloyed zinc industry, 37736
Business development program:
Steel industry, basic; guarantee loan assistance applications, 18626, 41255
Steel industry, lending guidelines, 16360
Business development program; applications:
Jones & Laughlin Steel Corp., 46361
McLouth Steel Corp., 51435
WSC Corp. et al., 27577
Environmental statements; availability, etc.:
Camas-Washougal, Port of, Wash., 29161
Import determination petitions:
Acme Garment Co., et al., 51124
Action Wear, Inc., et al., 52509
Air Baby, Inc., et al., 2203
American Pillow Co., Inc., et al., 9328
Antenna Inc. et al., 34179
Appliance Heater Corp. et al., 38613
Bagatelle International, Ltd., et al., 21922
Baroness Leather Products, Inc., et al., 42776
Boot-Ster Manufacturing Co., Inc., 31190
Charter Oak Industries, Inc., et al., 41071
CIBCO International Corp. et al., 35520
Cohan-Epner Co., Inc., et al., 36501
Compatibles et al., 26605
Crewco, Inc., et al., 19060
Danny Dare, Inc., et al., 46886
Eastern Rolling Mills, Inc., et al., 27878
Eico Electronic Instrument Co., Inc., et al., 25457
F. M. Weaver Inc. et al., 7338
Fairfield-Noble Corp. et al., 21922
Fairhaven Corp. et al., 11246
Great Six Co. et al., 59414
Haddad Shoe Corp. et al., 8171
Handi-Bag Co., Inc., et al., 14711
Helvetia Sugar Cooperative, Inc., et al., 45424
Herbst Shoe Manufacturing Co. et al., 17021
Infanta Knitting Mills, Inc., et al., 46361
Kirstein Leather Co. et al., 3737
L. & R. Sportwear Co., Inc., et al., 51435
Loree Footwear Corp. et al., 7388
Marilyn Handbags, Inc., et al., 2907
Mayer, Rothkopf Industries, Inc., et al., 18231
Methuen International Mills et al., 8576
Miami Footwear Corp. et al., 6293
NCC Industries, Inc. et al., 49343
Park Silk Co., Inc., et al., 24108
Quaker Shoe Corp. et al., 57318
Rio Grande Valley Sugar Growers, Inc. et al., 39406
Ronson Corp. et al., 18599
Scarsdale Fabrics, Inc., et al., 10613
Sentry Manufacturing Co. et al., 13912
Shoes by Raphael, Inc., et al., 7338
Simon's Outerwear, Inc., et al., 29161
Speed Tex Corp. et al., 25168
Thom Brown Shoes, Inc., et al., 24722
Time Saver Tackle, Inc., et al., 22430
U.S. Knitting Mills, Inc., et al., 55811
Victoria Needlework, Inc., et al., 36989
Webster Enterprises, Inc., et al., 53786
Wellco Enterprises, Inc., et al., 9841
Z. Dress Co. et al., 20525
Improving Government regulations; inquiry, 23177
Local public works capital development and investment program; Rounds I and II, 7338, 44560, 46361, 50953
Local public works economic development applications; Form ED-101A revised, 25853
Technical assistance, research and information:
State and local economic development planning grants, 26101

## ECONOMIC OPPORTUNITY, NATIONAL ADVISORY COUNCIL

### NOTICES

Meetings, 6665, 22250, 32472, 50762

## ECONOMIC OPPORTUNITY OFFICE

*See Community Services Administration.*

## ECONOMIC REGULATORY ADMINISTRATION

### RULES

Canadian crude oil, mandatory allocation:
Northern tier shortages, 6208
Coal; administrative procedures and sanctions:
Appeal from interpretations, 14436, 17803, 17804
Oil; administrative procedures and sanctions:
Appeal from interpretations, 14436, 17804
Ex parte communications in natural gas and electricity import and export proceedings, 39083
Interpretations, authority delegation to Assistant General Counsel, 15617
Interpretations; index, 1613, 17338, 49775
Interpretations of General Counsel, 1479, 5797, 12848, 15617, 19816, 23989, 25079, 29528, 34433, 40200, 46517, 51755, 57583
Remedial order, proposed disallowance and order of disallowance notices, 1931, 3997

Tertiary enhanced recovery techniques; additional price incentives, 33687
Oil import regulations:
Long-term control, license fees, 59461
1978-1979 allocations, 18990
Petroleum allocation and price rules:
Interpretations; index, 1613, 17338, 19816, 49775
Recordkeeping requirement, extension, and audit policy, 27781
Petroleum allocation regulations, mandatory:
Crude oil buy/sell program; northern tier shortages, 6208
Crude oil produced in California; entitlement obligations reduction, etc., 26545, 44468
Crude oil supplier/purchaser relationships; termination by producer; ruling, 1292
Interpretations, 1479, 5797, 29528, 34436, 51755
Interpretations; index, 1613, 17338, 49775
Refineries, limited-product, located in Alaska, 55324
Residual fuel oil; entitlements program, 49684
Synthetic fuels under entitlements program, 21432
Tertiary enhanced recovery techniques; additional price incentives, 33688
Petroleum price regulations, mandatory:
Crude oil, imputed stripper well, from unitized properties; production and sale, 33697
Crude oil, lower and upper tier; adjustments to reflect inflation impact, 10331, 24824, 40682, 57475
Crude oil and petroleum products, exchanges; interim rules and hearing, 59820
Crude oil produced in California; entitlement obligations reduction, etc., 26546, 44468
Interpretations, 1479, 12848, 19816, 29528, 34433, 51755
Interpretations; index, 1613, 17338, 49775
Landed costs computation; timing, 5800
Motor gasoline, refiners allocation of increased costs, 50388, 55745
Natural gas liquids and liquid products; passthrough of increased processing and marketing costs, 43000, 50842
Resellers and retailers; blends of covered and synthetic products, 24268
Retail gasoline sales; pass-through for costs of vapor recovery systems and increased rents, 50662, 55745, 60869
Tertiary enhanced recovery techniques; additional price incentives, 33689
Petroleum products regulations, low sulfur:
Interpretations; index, 1613
Powerplant and industrial fuel use:
Transitional facilities, 54913, 55745, 58092
Proceedings transfer to Energy Secretary and Federal Energy Regulatory Commission:
Electric energy import and export proceedings; procedures, 21657
Rulings:
Crude oil supplier/purchaser relationships; termination by producer, 1292
Index, 17338, 49775

**PROPOSED RULES**

Canadian crude oil, mandatory allocation:
Northern tier shortages, 55734
Priority designations of Koch Refining Co. et al., 13388
Coal, administrative procedures and sanctions:
Appeal from interpretations, 2729, 3568
Electricity import and export cases, procedures:
Ex Parte communications, 12330
Gasoline; contingency rationing plan, 28134, 31345, 36280
International oil allocation, 6794, 12333
Natural gas:
Priority for essential agricultural uses, 54660
Natural gas import and export cases, procedures:
Ex Parte communications, 12330
Oil; administrative procedures and sanctions:
Appeal from interpretations, 2729, 3568
Ex parte communications in natural gas and electricity import and export proceedings, 12330
Propane and other natural gas liquids; hearing and inquiry, 36264
Remedial order, proposed disallowance and order of disallowances notices, 13073
Oil import regulations; 1978-1979 allocations, 13386
Petroleum allocation and price rules, general:
Aviation gasoline decontrol, 6962, 27976, 29298, 41224
Crude oil or refined petroleum products in standby status; imposed allocation fraction, etc., 29565, 34786
Kerosene-base jet fuel decontrol, 6959, 27974, 29298, 41224
Motor gasoline, exemption; environmental assessment, availability; inquiry and hearing, 27995, 29131
Motor gasoline, exemption; recommendations, 14491
Petroleum allocation regulations, mandatory:
Alaska refineries, limited-product; entitlements program, 3916
Aviation gasoline decontrol, 6962, 27976, 29298, 41224
California crude oil, heavy; additional entitlement and pricing measures, 8150, 9488
Crude oil, domestic; nonrefining uses of price-controlled crude oil, 16987, 21682, 31157, 52104
Crude oil entitlements program; imported residual fuel oil, 26551
Crude oil or refined petroleum products in standby status; imposed allocation fraction, etc., 29565, 34786
Crude oil price controls; inquiry, 15158, 24847
Emergency standby mandatory crude oil and refinery yield control programs, 6611, 8158, 12332, 23587, 38848, 40233
Kerosene-base jet fuel decontrol, 6959, 27974, 29298, 41224
Middle distillates, set-aside procedures, 54180
Motor gasoline, exemption; environmental assessment, availability; inquiry and hearing, 27995, 29131
Motor gasoline, exemption; recommendations, 14491
Oil, domestic crude, entitlement program; refiners monthly report form, 26548
Production incentives for marginal properties, 52186, 60933
Propane and other natural gas liquids; hearing and inquiry, 36264
Small refiner bias; level of benefits reduction, 54652, 60933
Synthetic fuels under entitlements programs; application guidelines, 38844
Petroleum price regulations, mandatory:
Aviation gasoline decontrol, 6962, 27976, 29298, 41224
California crude oil, heavy; additional entitlement and pricing measures, 8150, 9488
Crude oil or refined petroleum products in standby status; imposed allocation fraction, etc., 29565, 34786
Crude oil price controls; inquiry, 15158, 24847
Emergency standby mandatory crude oil and refinery yield control programs, 6611, 8158, 12332, 23587, 38848, 40233
Kerosene-base jet fuel decontrol, 6959, 27974, 29298, 41224
Motor gasoline, exemption; environmental assessment, availability; inquiry and hearing, 27995, 29131
Motor gasoline, exemption; recommendations, 14491
Motor gasoline, refiners allocation of increased costs, 57609, 57610
Natural gas liquids; "transfer" or "plant gate" pricing by processors and refiners; hearing change, 54256
Natural gas liquids and liquid products; maximum lawful price computation; inquiry, 28518, 31344
Production incentives for marginal properties, 52186, 60933
Propane and other natural gas liquids; hearing and inquiry, 36264
Refiners, reporting requirements; update, 47978
Resellers and retailers; blends of covered and synthetic products, 10935
Powerplant and industrial fuel use, 53974

**NOTICES**

Appeals and applications for exception, etc.; cases filed with Administrative Review Office:
List of applicants, etc., 786, 1637, 1981, 1982, 2425, 2426, 2430, 2754, 3153, 3155, 3423, 4278, 4452, 4670, 5036, 5861, 5864, 5867, 6133, 6135, 6138, 8006, 8009, 8011, 9195, 9196, 9333, 9844, 9851, 9854, 11731, 11734, 11736, 11737, 11738, 11740, 11742, 11743, 11846, 12747, 13607, 13609
Canadian allocation program:
Crude oil; priority designation evaluation; conference, 20856
Crude oil; April through June (1978), 16373, 28534
Crude oil; July through September (1978), 28537
Crude oil, October through December (1978), 42028, 59872
Crude oil, January through March (1979), 59877
Carbon dioxide effects research and assessment; global carbon cycle and climate change; availability, 18233
Coal use, construction orders:
Bellefield Boiler Plant et al., 26346
General Electric Co., 20260, 21927
Goodyear Tire & Rubber Co., 20855, 32451
Consent orders:
Allen & Shumate, Inc., 8003, 25179

Asphalt & Petroleum Industries, 8004, 20856
Blue Ridge Fuel Co. (Iandoli), 24727, 41258
Howard Oil Co., 8004, 24727
La Gloria Oil & Gas Co., 33951
McAlester Fuel Co., 8005
Phillips Petroleum Co., 22771
Standard Oil Co. of California, 50023
Texaco Inc., 58621
Texas Eastern Transmission Corp., 25180
Wood Oil Co., 8005
Crude oil, domestic; allocation program:
Refiners buy/sell list; October through March, 39412, 42291, 43064
Small refiner bias under entitlement program; inquiry, 5870
Crude oil, domestic, allocation program; 1977; entitlement notices:
November, 3612
December, 7342
Crude oil, domestic, allocation program; 1978; entitlement notices:
January, 12905
February, 17030
March, 22435
April, 28229
May, 32164
June, 38072
July, 44878
August, 50013
September, 54689
October, 60185
Electric utilities; petitions filed under section 202(c), 8012, 8832, 9855, 24570, 27581, 28030, 29027, 34184
Environmental statements; availability, etc.:
Columbia LNG Corp. et al., 41257, 41422
El Paso Eastern Co. et al., 43063
Motor gasoline, exemption from mandatory petroleum allocation and price regulations; inquiry, 54125
New England Electric System/New England Power Co.; powerplant prohibition order; hearings, 47243
Northern States Power Co. 500 kV international transmission line, Minn., 42777
Potomac Electric Power Co., 46563
Powerplant and Industrial Fuel Use Act implementation, 52515
Southern California Gas Co., 10434, 10616, 15481
Fuel burning installations, early planning process identification report; completion requirement, 42034
Home heating oil prices; monitoring system, 2917
Industrial plants burning natural gas or petroleum products, prohibition orders:
Alabama Electric Cooperative, Inc., 49035
Ash Grove Cement Co., 19064, 54126
Avtex Fibers, Inc., 18233, 31429
Central Telephone & Utilities Corp., 20538
Colorado Springs, Colo., City of, et al., 48687
Colorado Ute Electric Association et al., 48683
Iowa Electric Light & Power Co., 3157
Iowa Public Service Co., 49036
Iowa Public Service Co. et al., 28229
Martin Marietta Corp., 19070, 54127
Public Service Co. of Colorado, 33288, 33294, 33300, 33305, 35984, 38742
Public Utilities Department, 20534
Savannah Electric and Power Co., 49036
Scott Paper, Co., et al., 18237, 19910
United Power Association, 4084, 16535
International transmission line, U.S. Canadian border; modification, 46999
Meetings:
Fuel Oil Marketing Advisory Committee, 3926, 11593, 16380, 21347, 36992, 43548, 60989
Gasoline Marketing Advisory Committee, 36992, 52044
Interconnection, wheeling, and pooling in the Southwest, 51498
Middle distillate (short-term) and gasoline supply situation and price trends, 56931
Motor gasoline production conference, 35984, 40904
Middle distillate (short-term) and gasoline supply situation and price trends; conference, 56931
Motor gasoline production conference, 35984, 40904
Motor gasoline supply and demand for 1980; analysis memorandum, availability; inquiry, 59541
Natural gas:
Coal emergency purchasers; eligibility evaluation guidelines, 11748
Synthetic; allocation of naptha and propane; consideration of petition of Algonquin Gas Transmission Co.; inquiry, 3740
Synthetic; petroleum feedstocks allocation, 2431
Natural gas importation; petitions:
Columbia LNG Corp. et al., 31962, 40276, 58613
Gas Service, Inc., et al., 47769
Great Lakes Gas Transmission Co., 21715, 60190
Midwestern Gas Transmission Co., 60190
Northern Natural Gas Co. et al., 16380, 29348, 36131
Southern California Gas Co., 11250, 17858, 37480
St. Lawrence Gas Co., Inc., 52760, 59421
Oil import allocations and licensing, 1978; reports:
May, 31192
June, 31192
July, 35376
August, 40052
September, 46892
October, 52513
November, 58113
Petroleum allocation regulations, mandatory:
Applications; multiple allocation fractions for motor gasoline, etc.; inquiry, 19431
Gas utility use of propane by Piedmont Natural Gas Co., Inc.; inquiry, 33952, 37210
Indiana Gas Co., Inc., gas utility use of propane; inquiry, 32450, 36992
Petroleum price regulations, mandatory:
Injection wells; enforcement, 13093
Pipeline carriers:
Investigation procedures, 1639, 1984, 7017, 8834
Power rates and charges:
Central Valley Project, Western Area Power Administration, 3158, 4282, 12361, 25178
Cumberland Basin Projects, Southeastern Power Administration, 29026
Hanford Generating Project, Bonneville Power Administration, 2206, 16535, 28031, 45630, 47244
Laurel Project, Southeastern Power Administration, 2206, 5861, 7686, 17857, 25856, 43547, 51126
Rio Grande Project, Western Area Power Administration, 8578, 14984
Sam Rayburn Project, Southwestern Power Administration, 24570
Southwestern Power Administration, 25179
System rates, Southwestern Power Administration, 34523, 57180
Transmission rates; Bonneville Power Administration, 21716, 29163
Powerplant and industrial fuel use:
Early filing procedure, 55449
Powerplant and major fuel burning installation petitions for existing facility classification; forms, inquiry, 50703
Ratemaking authority over gas and electric utilities; requirement for notification of DOE by State and local agencies; inquiry, 59883
Refiners buy-sell list; crude oil allocations, 8832
Rulemaking docket system, 42035
*Hearings, etc.:*
Arizona Public Service, 19908
El Paso Eastern Co. et al., 11849, 15481, 19279
Maine Public Service Co., 26608, 34523
Massachusetts Municipal Wholesale Electric Co., 60989
New York Power Pool, 19908
Niagara Mohawk Power Corp., 45433
Northern States Power Co., 19909
Pac Indonesia LNG Co. et al., 7250, 46065
Piedmont Natural Gas Co., Inc., gas utility use of propane, 33952, 37210
Tenneco Atlantic Pipeline Co. et al., 26609, 33820, 35524
West Texas Utilities Co., 19909

## EDUCATION

*See Education Office.*
*Food and Nutrition Service.*
*Health, Education, and Welfare Department.*
*National Institute of Education.*
*Science and Education Administration.*
*Veterans Administration.*
*Wage and Hour Division.*

## EDUCATION OFFICE

### RULES

Basic educational opportunity grant program:
Family contribution calculating explanations deleted, 2631
Family contribution schedule, 3911
Citizen education for cultural understanding program, 20496
College work-study program, 37925
Sample cases and benchmark figures, 34146
Community service and continuing education program, 35701
Cooperative education programs, 18676
Direct project grant and contract programs; CFR correction, 46020
Educational information centers program, 55407
Educational opportunity centers; funding criteria; correction, 49539
Emergency school aid:
Compensatory projects, special, 26014
Grant appeals process; assistance termination grounds and procedures, etc., 36251

Magnet schools, etc., grants for planning and operation, 36230
Guidance, counseling and testing programs; Elementary and Secondary Education Act guidelines deleted, 2630
Handicapped, research in education, 36634
Handicapped children:
Indian lands, etc.; handicapped children residing on; entitlements, 19762
State operated programs, 16268
Health education assistance loan program; interim regulations and hearings, 34324
Higher education, student assistance programs; limitation, suspension, or termination of institutional eligibility; correction, 6320
Indirect costs under certain programs:
Community service and continuing education programs, 35701
Migratory children, special education needs; grants to State educational agencies, 43719, 52678
National direct student loan program, 37903
Sample cases and benchmark figures, 34146
Neglected or delinquent children in institutions; grants to State agencies, 14294
Nondiscrimination; desegregation of public education, 32380, 46020, 46021
Postsecondary education commissions program, State, intrastate planning; allocation formula and program guidelines, 21330
Reading improvement program, National; State programs statement of purpose, etc., deleted, 2630
Removal of obsolete CFR parts, 57254
School assistance in federally affected areas:
Awarding assistance, requirements and criteria, 19129
Handicapped children residing on Indian lands, etc., entitlements, 19762
School dropout reduction projects, financial assistance; Elementary and Secondary Education Act guidelines deleted, 2630
Simplification of regulations, 35484
State-administered programs:
Community service and continuing education programs, 35701
Study fellowships, graduate and professional, and institutional grants; procedures governing awards, 9248
Supplemental educational opportunity grant program, 37943
Sample cases and benchmark figures, 34146
Teacher centers program, 1765, 20009
Teacher Corps, 7530, 11703
Vocational education:
Commissioner's discretionary program; correction, 3909, 46026
State program; correction, 3909

**PROPOSED RULES**

Adult education programs, State; advance notice, 55801
Basic educational opportunity grant program, 20922
Family contribution schedule, 35964
Program operation; advance notice, 12048
Capacity-building program, State; grants for improvements in statistical systems; advance notice, 22062
Career education:
Discretionary programs, 58912
Incentive program; advance notice, 8562
State allotment program, 58912
College work-study program:
Funding changes; hearings, 25149
Funds distribution, family income estimates, etc., 52128, 57308
Correction education program; advance notice, 53046
Educational information centers program, 1895, 2899
Educationally deprived, handicapped, and delinquent children; financial assistance to State and local educational agencies; waiver criteria; advance notice, 8561
Emergency school aid:
Grant appeals process; assistance termination grounds and procedures, etc., 1969
Magnet schools, etc., grants for planning and operation, 4639
Gifted and talented program; advance notice, 51431
Guaranteed student loan program, 14376, 31104, 41056
Handicapped; media services and captioned films program; advance notice, 18711
Handicapped, research in education, 8228
Health education assistance loan program; advance notice, 12048
Indian education program; advance notice, 51432
Libraries:
Learning resources; instructional materials, guidance, counseling, and testing, etc.; advance notice, 55801
Services, construction, etc.; matching funds, base year, and urban resource libraries, 8561, 24333
Migratory children, grants to State educational agencies; special educational needs; advance notice, 8561, 55801
National direct student loan programs
Funding changes; hearings, 25149
Funds distribution, family income estimates, etc.; hearing change, 52128, 57308
Nondiscrimination; desegregation of public education, 11676
Preschool partnership program; advance notice, 51432
School assistance in federally affected areas:
Awarding assistance, requirements and criteria, 8561, 58022
Construction; advance notice, 51431
Maintenance, operation, and construction; advance notice, 51431
Service learning centers program, 1892, 2899
State administered programs:
Consolidated grants to Pacific Island Territories and Virgin Islands; advance notice, 46871
Strengthening developing institutions program, 51260
Student assistance programs:
Audits, records, financial responsibility, etc.; standards, 35624
Supplemental educational opportunity grant program:
Funding changes; hearings, 25149
Funds distribution, family income estimates, etc., 52128, 57308
Training program for special programs staff and leadership personnel, 1898, 2899, 53781
Vocational education:
State program; Education Hearing Board, estabalishment; advance notice, 8561
Women's Educational Equity Act program; advance notice, 55801

**NOTICES**

Accrediting agencies and associations; Nationally recognized; list, 1548
Adult Education National Advisory Council; annual report; availability, 2009
Audit appeals:
Utah, 2762
Bilingual Education National Advisory Council; hearings, 18264
Committees; establishment, renewals, terminations, etc.:
Accreditation and Institutional Eligibility Advisory Committee, 22450
Education of Disadvantaged Children, National Advisory Council, 21946
Extension and Continuing Education National Advisory Council, 21947
Global Effects of Carbon Dioxide Study Group, 42784
Indian Education National Advisory Council, 4286
Management Office Advisory Committee; telephone number change, 42784
State Postsecondary Education Commissions, 3945
Vocational Education Advisory Council, 20279
Disadvantaged children, National Advisory Council on Education of; site visit to program in western New York, 33347
Elementary and Secondary Education Act; parent advisory councils, establishment and selection; interpretation, 50252
Emergency school aid; court-ordered desegregation activities, interpretation, 32193
Grant applications and proposals, closing dates:
Adult education strategies and varieties of liberal education, 58120
Advanced institutional development program; extension, 4287
Basic educational opportunity grant program, 40319
Basic institutional development program, 6841
Broadcasting facilities, noncommercial educational, 29989
Career education program, 5438
College work-study program, 57986
Community service and continuing education--special projects program, 11603, 18116
Desegregation of public education programs, 11686, 21735, 32388
Direct, discretionary grant programs, 37618, 43769, 53500
Educational broadcasting facilities program, 36698
Educational information centers program, 28562
Emergency school aid, 796, 4684, 8300, 8855, 13436
Emergency school aid, FY 1979, 49055
Emergency School Aid Act; preimplementation assistance, 57349
Environmental education program, 4113
Ethnic heritage studies program, 51145
Follow Through programs, 20560
Graduate and professional opportunities program, 4685
Handicapped, field initiated research, 31435
Handicapped, student research program, 31437
Handicapped children's early education program, 31436

Handicapped children's model programs, 8187
Handicapped media services and captioned films programs, 11604
Handicapped personnel preparation, 31436
Indian adult education, special programs, 57984
Indian children, special programs and projects to improve education opportunities, 4458
Indian children, special programs and projects to improve educational opportunities, 57982
Indian education assistance to local education agencies, 57979
Indian education assistance to non-local education agencies, 4457, 57980
Indian fellowship program, 57982
Indians, adult, special education programs, 4459
Law school clinical experience program, 2666, 10635, 29996
Mining, domestic, and mineral and mineral fuel conservation fellowships; extension of time, 9353
National direct student loan program, 57986
Pinpoint disaster assistance, 57194
Postsecondary education improvement fund, 54299, 54300
Right to read reading academy program, 13098
School assistance in federally-affected areas, 40320
School construction assistance, 18613
State planning commissions; program-interstate planning, 12758, 15013
Strengthening developing institutions program, 53501
Strengthening research library resources, 5076
Student financial assistance training program, State, 57985
Student incentive grant program, State, 57985
Supplemental Educational Opportunity Grant, College Work-Study, and National Direct Student Loan Programs, 41289
Supplemental educational opportunity grant program, 57986
Teacher centers program, 1781
Teacher Corps program, 7477
Teacher Corps program; criteria for preparing application, 41286
Upward bound-veterans projects, 57987
Veterans' cost-of-instruction payments program, 21735
Vocational education graduate leadership development program, 2763
Vocational education teacher certification fellowship program, 4460
Women's Educational Equity Act program, 4686
Guaranteed student loan programs; special allowances, 3439, 18117, 33965, 49575
Handicapped persons; vocational education availability and accessibility statement, 43388
Health Education Assistance Loan Program, interest rate, 49575
Higher Education Act (HEA) of 1965; reauthorization issues, hearings, 60667
Improving Government regulations; inquiry, 23135
Information collection and data acquisition activity, description, inquiry, 1007, 6326, 8591, 10617, 13920, 16408, 19453, 23654, 25476, 27239, 29830, 32861, 37492, 39181, 42784, 49367, 50506, 53059, 54996, 57660, 60227
Libraries:
Services, construction, etc.; promulgation of Federal shares, 60235
Meetings:
Accreditation and Institutional Eligibility Advisory Committee, 7706, 16810, 23655, 25740, 40320, 42306, 45646, 48718, 55467
Adult Education National Advisory Council, 7708, 9354, 9535, 17405, 19466, 23016, 31991, 37013, 37762, 38943, 49851, 52528, 57195, 60336
Bilingual Education National Advisory Council, 2667, 13098, 18264, 24608, 38942, 51146, 55469
Black Higher Education and Black Colleges and Universities National Advisory Committee, 3624, 11761, 21050, 30621, 32332, 36326, 53500
Career Education National Advisory Council, 29033, 32864, 39608
Community Education Advisory Council, 7707, 13922, 30900, 43768, 46910, 54301
Consumer Affairs Advisory Committee, 9201
Developing Institutions Advisory Council, 6165
Education of Disadvantaged Children National Advisory Council, 3780, 5573, 7048, 8188, 11761, 17405, 19466, 22451, 28253, 38115, 40549, 43388, 46586, 50046, 54302, 54996, 59441, 59442
Equality of Educational Opportunity National Advisory Council, 1408, 7047, 16412
Ethnic Heritage Studies National Advisory Council, 12090, 14361, 15198, 33823
Extension and Continuing Education National Advisory Council, 5601, 5602, 17870, 24608, 39428, 49056, 52776, 55468
Financial Aid to Students Advisory Council, 42786, 48018, 53500
Foreign Language and International Studies, President's Commission, 46908, 60236
Indian Education National Advisory Council, 19294, 35396, 38942, 49367, 52527
Rights and Responsibilities of Women Advisory Committee, 8189
Vocational Education National Advisory Council, 1653, 2008, 7047, 15198, 21946, 25489, 27904, 29034, 34844, 43769, 51726, 54301, 58629, 60236
Women's educational equity act program, 41439
Women's Educational Programs National Advisory Council, 2009, 10444, 18265, 23760, 37763, 52528
Meetings; Sunshine Act, 50283
National direct student loan program:
Need analysis systems, approved list, 50970
Nondiscrimination:
Desegregation of public education programs; applications, closing date, 11686, 21735
Occupational information; interagency agreements, 5348
Organization and functions:
Office of Commissioner, Horace Mann Learning Center, 29998
Postsecondary education institutions, resources extension policies and procedures; hearing, 5602
Privacy Act; systems of records, 15785
School assistance in federally affected areas; "absorption" provision computation; interpretation, 31436
Vocational education:
Contracts, project priorities for 1979 FY; inquiry, 11858
Graduate leadership development program; approved institutions; list, 2762
Handicapped persons, statement of availability and accessibility, 43388
State programs; excess cost requirement; interpretation, 12757
Teacher certification fellowship program; teacher shortages, 18117
Women's Educational Equity Act Program, 41439, 52528, 54301

## EDUCATIONAL STATISTICS, NATIONAL CENTER

**RULES**
Statistical activities in State educational agencies, capacity building grants, 30278
**NOTICES**
Grant applications and proposals, closing dates:
Statistical activities in State educational agencies, capacity-building program, 30355

## ELECTIONS

*See Census Bureau.*
*Civil Rights Commission.*
*Federal Election Commission.*
*Justice Department.*

## ELECTRICITY

*See Bonneville Power Administration.*
*Federal Energy Regulatory Commission.*
*Reclamation Bureau.*
*Rural Electrification Administration.*
*Tennessee Valley Authority.*
*Western Area Power Administration.*

## ELECTRONIC FUND TRANSFERS, NATIONAL COMMISSION

**NOTICES**
Privacy Act; systems of records; transferred to GSA, 801

## EMERGENCY LOAN GUARANTEE BOARD

**RULES**
CFR Chapter deleted, 40803

## EMPLOYEE BENEFITS SECURITY OFFICE

*See Pension and Welfare Benefit Programs Office.*

## EMPLOYMENT AND TRAINING ADMINISTRATION

*See also Manpower Administration.*

RULES

Administrative procedure:
Tax credit reductions; deferral, 13828
Alien temporary agricultural and logging employment in U.S.; labor certification, 10312
Employment Service System:
Alien temporary agricultural and logging employment in U.S.; labor certification, 10312
Special responsibilities; labor surplus areas classification, 9103
Employment Service System, Federal-State:
Alien temporary agricultural and logging employment in U.S.; labor certification, 10311
Special responsibilities; labor surplus areas classification, 9103
Veterans services; preference indicators of compliance, 1978 FY, 9093, 12855
Foreign temporary labor other than agricultural and logging, 10311
Housing for agricultural workers, 36058
State program budget plans:
Special responsibilities; labor surplus areas classification, 9103
Unemployment compensation:
Benefit payment promptness standard, 33225
Ex-servicemen, new schedule of renumeration, 59837
Extended benefits, 13819
Unemployment Compensation Program, Federal-State
Employment and wages, interstate arrangement for combining, 2625

PROPOSED RULES

Alien temporary agricultural and logging employment in U.S.; labor certification:
Adverse effect wage rate, Texas, 22996, 26033
Housing for agricultural workers, 39124
Employment service system:
Basic and support services, 49694
Housing for agricultural workers, 39124
Veterans preference indicators; compliance levels, 1979 FY, 50380
Employment service system, Federal-State:
Basic and support services, 49695
Housing for agricultural workers; applicability, 39124
Unemployment compensation and assistance:
Ex-servicemen; remuneration schedule; rate increase, 49545

NOTICES

Alien certification program, temporary; agricultural workers, 1978 adverse effect rates, 16431
Comprehensive Employment and Training Act programs:
Allocation methodology, 44912
Economic stimulus package reallocations, 11766, 19927
Employment opportunities pilot program site selection, 38122
Financial assistance; preapplication requests, 11536
Funds allocation for 1977 and 1978 FYs, 4129, 18345
Funds allocation for 1979 FY, 59141
Indians and Native Americans, 29841, 44912
Planned performance review, guidelines, 40650
Sponsors, prime; annual area wage adjustment index, FY 1979, 61134
Summer program for economically disadvantaged youth (SPEDY); reallocation for Virginia, 50272
Youth, economically disadvantaged, 29843
Youth community conservation and improvement projects and youth employment and training programs; funds availability etc., 3774
Employment transfer and business competition determinations; financial assistance applications, 1140, 2020, 2943, 3772, 4694, 5904, 7063, 7728, 9885, 9886, 11273, 12392, 13646, 14750, 15804, 17064, 18354, 19471, 20565, 21746, 22791, 24147, 25197, 26145, 27910, 28573, 29362, 30368, 32883, 32884, 34548, 35758, 36703, 38122, 41304, 42048, 44911, 46388, 47302, 49058, 49580, 50271, 51468, 53845, 56291, 60242
Environmental statements, Job Corps centers; availability, etc.:
Bethel College, Minn., 7063
Cortez Hotel, Tex., et al., 27914
Kittrell College, N. C., 44
Lockheed Electronics Assembly Plant, Ariz., 7062
Monroe, Va., 3774
Outlying Land Field, Calif., 27913
Springdale, Oreg., 3772
University of Nevada (Stead Campus), Nev., 7062
Farmworker economic stimulus programs:
Funds allocation and grant applications availability, 4129
Hispanic American labor market problems and issues; grant awards, approved applicants, 40069
Hispanic American labor market problems and issues; grant awards, closing date and guidelines, 16431
Indian and Native American economic stimulus programs:
Fund allocations, 1979 FY, 40556
Summer program; funds allocations, 27911
Labor surplus area classifications; quarterly list, 44912
Labor surplus areas:
North Carolina, 40069
Meetings:
Apprenticeship Federal Committee, 2945, 5905, 10647, 27260, 45653, 61035
Migrant and seasonal farmworker programs:
Funding cycle changes, 30369, 45924, 46389
Funds allocation, 1977 and 1978 FYs, 14750
Funds allocation, 1978 and 1979 FYs, 35124, 52789
HEP and CAMP projects funding, 27913
Manpower programs, sponsors, 28574
National Longitudinal Surveys; postdoctoral grant awards, 8197
Occupational information; interagency agreements, 5348
Senior community service employment program:
Sponsoring organizations; funding, 13647
Skill training improvement program; grant applications, 19471
Unemployment compensation:
Federal extended benefits; "on" and "off" indicators; various States, 2944, 3773, 4695, 8197, 21066, 21067, 27261, 27910, 29363, 31456, 34548, 34549, 34550, 49059, 58123
Unemployment tax, Federal, tax credit; New Hampshire decision, 44
Youth Employment and Demonstration Projects Act programs:
Youth community conservation and improvement projects; funds availability, etc., 19472
Youth community conservation and improvement projects and youth employment and training programs; funds availability, etc., 3774
Youths, migrant and seasonally employed farmworker family members; funds availability, etc., 19472, 28575, 40070

## EMPLOYMENT AND UNEMPLOYMENT STATISTICS, NATIONAL COMMISSION

NOTICES

Hearings, 16555, 19303, 23660, 24635, 26620
Meetings, 12401, 19940, 25746, 39464, 45925, 51149

## EMPLOYMENT STANDARDS ADMINISTRATION

*See also Wage and Hour Division.*

RULES

Black lung disease:
Claims, pending and denied; review, 36819
Claims for benefits; handling and adjudication, 36772, 50172
Longshoremen's and Harbor Workers' Compensation Act:
Administration and procedures, 50171
Minimum wage determinations:
Fair Labor Standards Act adjustment to wage increases, 28495
Service contracts, Federal:
Filing of complaints with Administrative Law Judges Office, 6944
Labor standards; organizational changes, 28467
Student-learners, apprentices, messengers, handicapped-workers, etc.:
Employment certificates, annulment or withdrawal, 28469

PROPOSED RULES

Black lung disease:
Claims, pending and denied; review, 17765
Claims for benefits; handling and adjudication, 17732
Disability or death determination standards, 17722, 18699, 19863, 26588, 27196
Minimum wage determinations:
Fair Labor Standards Act adjustment to wage increases, 12337

NOTICES

Authority delegations
Deputy Assistant Director for Employment Standards et al.; procurement responsibilities, 51469
Minimum wages for Federal and federally-assisted construction; general wage determination decisions, modifications, and supersedeas decisions:
Alabama, 1263, 2117, 3023, 4797, 4805, 5973, 7103, 7875, 9063, 12527, 12532, 14833, 14839, 17174, 18443, 18446, 19541, 22876, 25266, 29419, 31539, 34659, 36835, 36838, 40159, 40172,

43147, 43152, 47422, 50295, 52633, 55127, 56361, 61183
Alaska, 10160, 61191
Arizona, 7103, 7875, 11361, 18443, 20647, 28709, 33014, 35826, 38273, 40159, 41339, 50295, 55128, 56353, 57769, 61183
Arkansas, 2117, 3023, 5973, 7875, 10156, 17161, 19541, 26232, 27341, 28722, 31550, 33014, 41339, 49149, 51563, 57779, 61185
California, 3844, 7876, 7881, 9063, 17162, 19542, 20647, 22879, 29431, 33007, 35835, 36839, 38273, 39250, 40159, 41340, 45092, 53960, 57770, 58716
Colorado, 17163, 30431, 45092, 53966
Connecticut, 7110, 17163, 19542, 20648, 24175, 27327, 28709, 33023, 34659, 35810, 36835, 38274, 41340, 43147, 45092, 47422, 50296, 56362, 60029, 61186
Delaware, 3023, 10156, 21799, 38274, 51567, 56377, 57771
District of Columbia, 4803, 4804, 9084, 10166, 11464, 14834, 17172, 19549, 21813, 29430, 33008, 47422, 55130, 58723
Florida, 3023, 4797, 7912, 10166, 12527, 12534, 13733, 14834, 16043, 18443, 21799, 22911, 24177, 25267, 26225, 26234, 29419, 30456, 33008, 34659, 34661, 35809, 35811, 36835, 36848, 38277, 39249, 40159, 40173, 41340, 45092, 46449, 53960, 55131, 57771, 60029
Georgia, 1264, 3023, 5973, 5974, 7914, 9074, 10155, 10157, 10166, 11361, 14833, 16041, 22865, 35809, 35811, 40173, 43148, 46441, 47422, 49150, 50302, 55142, 56354
Guam, 12537, 41347
Hawaii, 3839, 11366, 20648, 30423, 41341, 55143
Idaho, 2118, 3839, 4798, 14841, 18444, 20648, 24178, 25251, 28710, 30423, 30424, 31539, 40176, 50296, 55132, 56355
Illinois, 7125, 11371, 12538, 20649, 21800, 22866, 26227, 28712, 30425, 31540, 34662, 35811, 39260, 45092, 49154, 50303, 51573, 52638, 55147, 56355, 56377, 57767, 57771, 57781, 60030
Indiana, 1264, 7125, 9063, 10167, 12581, 17163, 21803, 24183, 28712, 31535, 33003, 39260, 45092, 49196, 56382, 57789
Iowa, 3023, 7104, 14855, 16041, 19543, 27328, 33009, 55161
Kansas, 4796, 4808, 5976, 7104, 18447, 19550, 20655, 20658, 31540, 35823, 46441, 58716, 61187
Kentucky, 1266, 3023, 4796, 4805, 5972, 5974, 7125, 14834, 14859, 17171, 43148, 45092, 46441, 56393, 57772
Louisiana, 1276, 3023, 3839, 4798, 7104, 7125, 9064, 12527, 16041, 17171, 20659, 21809, 24190, 27329, 28713, 28722, 29420, 30456, 33014, 34659, 35824, 35841, 36835, 38275, 41343, 45092, 46449, 47422, 51564, 53961, 55133, 57772, 58716, 60030
Maine, 3024, 53958, 56377
Maryland, 1267, 3867, 4803, 5974, 7104, 9067, 9076, 9084, 10157, 11464, 16045, 17172, 19549, 20655, 21813, 27329, 29421, 29430, 31540, 33008, 40159, 41343, 46442, 51565, 52633, 53961, 56377, 58723
Massachusetts, 3024, 16048, 17175, 18449, 20655, 40159, 43155, 46442, 51580, 52634, 56356, 56377
Michigan, 4817, 10193, 12528, 16064, 22865, 24200, 26232, 27329, 28712, 29422, 31541, 39260, 41343, 45092, 46443, 49150, 53962
Minnesota, 7878, 10221, 12529, 22912, 24191, 28712, 30459, 31539, 34668, 36836, 38275, 39250, 39260, 40159, 43149, 45092, 47422, 50332, 53962, 55133, 61187
Mississippi, 1267, 2118, 3023, 4818, 5974, 7128, 7914, 9078, 12529, 12602, 16065, 17172, 19544, 27329, 28713, 28722, 28732, 33014, 34668, 41348, 43221, 47422
Missouri, 3023, 7125, 7880, 11361, 19544, 19550, 21815, 45092, 46464
Montana, 17207, 18467, 34669
Nebraska, 4799, 4819, 5972, 5974, 13733, 16041
Nevada, 1267, 2119, 3839, 4799, 10229, 11441, 14837, 18444, 24196, 27330, 28713, 30426, 40159, 41343, 41351, 50297, 50344, 55135, 57773
New Hampshire, 7105, 22867, 46466, 56350, 56377, 58718
New Jersey, 3025, 3840, 5974, 7106, 9067, 10157, 12530, 14838, 17223, 25251, 26235, 30425, 36837, 38275, 40159, 41344, 46443, 50298, 56356, 56377
New Mexico, 1267, 5978, 7880, 10158, 10244, 11361, 17172, 19559, 24197, 35853
New York, 1268, 4800, 4820, 7107, 10247, 11273, 12530, 16066, 26250, 28712, 31539, 34693, 34704, 39260, 45092, 49196, 50351, 52647, 55136, 55180, 56377, 56402
North Carolina, 1262, 1269, 10166, 12602, 14834, 16041, 16095, 29463, 33012, 45092
North Dakota, 5975, 7880, 9068, 10252, 31563, 41344, 43222
Ohio, 3026, 5989, 7125, 7915, 10257, 19545, 19562, 20671, 21809, 25254, 26225, 28712, 31539, 35810, 39260, 45092, 49149, 50300, 52656, 55185, 61183, 61196
Oklahoma, 1270, 2120, 3025, 5975, 7880, 11363, 11451, 13736, 19545, 25268, 26258, 27332, 30427, 33012, 41363, 43149, 49151, 61188
Oregon, 3841, 10158, 28723, 31547
Pennsylvania, 3026, 4801, 7880, 7923, 9071, 10158, 11364, 12603, 16042, 16097, 17239, 18476, 19546, 19574, 20656, 20697, 21811, 22868, 24198, 27332, 28712, 28718, 29422, 30425, 31539, 33012, 35865, 36849, 39259, 39260, 40159, 41345, 43149, 43224, 45092, 46444, 46475, 49152, 49205, 50300, 50357, 52635, 53962, 55141, 56357, 56377, 57777, 58719, 58729, 60030
Puerto Rico, 12531, 13738, 51587
Rhode Island, 16043, 31551, 39259, 43152, 56377, 58719
South Carolina, 1270, 10166, 14834, 16042, 16108, 20717, 45092, 47422, 60029
South Dakota, 3028, 3843, 17239, 25263, 25278, 40189, 46447
Tennessee, 1272, 3023, 4796, 4805, 10159, 10269, 14834, 16111, 18445, 21827, 28722, 29464, 33013, 33014, 34660, 43148, 49152, 49205, 50300, 55217, 56358
Texas, 1272, 2121, 2125, 3023, 3029, 3843, 7109, 7132, 9072, 10271, 12531, 13739, 16112, 19549, 20657, 20718, 21812, 24199, 26271, 27340, 28721, 29428, 30429, 31569, 34660, 34703, 34704, 35881, 36837, 36851, 38276, 41345, 41363, 43233, 45092, 46447, 49152, 49153, 49208, 50300, 51565, 51566, 53965, 55141, 56360, 56408, 58721, 60030
Utah, 2122, 4802, 11454, 25263, 28722, 31547, 35824, 40159, 46480, 50302, 56360, 61190
Vermont, 33038, 35887, 39259, 46490, 57777
Virgin Islands, 12611
Virginia, 4796, 4803, 5975, 7109, 9084, 10166, 11464, 14834, 17172, 18481, 19549, 19579, 20719, 21813, 24200, 25264, 29430, 33008, 34706, 41366, 43244, 47422, 50301, 51588, 55218, 57778, 57794, 58723, 61190
Washington, 4803, 10159, 26271, 28734, 31548, 34661, 45092, 49154, 61199
West Virginia, 3026, 7125, 9073, 25264, 25278, 30429, 35825, 40159, 45092, 47422, 52636, 60031
Wisconsin, 2122, 4804, 7109, 21813, 22876, 25264, 28712, 31539, 39260, 45092, 49209, 50360, 52672
Wyoming, 3870, 4825, 5975, 10276

## ENDANGERED SPECIES

*See Fish and Wildlife Service.*
*National Oceanic and Atmospheric Administration.*

## ENDANGERED SPECIES COMMITTEE

**NOTICES**
Grayrocks Dam and Reservoir Project; hearing, 59871
Tellico Dam and Reservoir Project; hearing, 59871

## ENDANGERED SPECIES SCIENTIFIC AUTHORITY

**RULES**
Export findings:
Bobcat, lynx, river otter, and American ginseng; 1978-1979 season, 39310

**PROPOSED RULES**
Export findings:
Bobcat, lynx, river otter, and American ginseng, 29470, 35014, 36293

**NOTICES**
Export; bobcat, lynx, river otter, and American ginseng:
Guidelines and information needs, 15098
Hearing, 13913
Public participation procedures in export findings for 1978-79, 11097
Summary of findings for 1977-78 season, 11082
Meetings; public attendance procedures, 7341

## ENERGY

*See Bonneville Power Administration.*
*Federal Energy Regulatory Commission.*
*Geological Survey.*
*Southeastern Power Administration.*
*Southwestern Power Administration.*
*Western Area Power Administration.*

## ENERGY CONSERVATION

*See Commerce Department.*
*Energy Information Administration.*
*General Services Administration.*

## ENERGY DEPARTMENT

*See also Bonneville Power Administration.*
*Economic Regulatory Administration.*
*Energy Information Administration.*
*Energy Research Office.*
*Energy Technology Office.*
*Environment Office, Energy Department.*
*Federal Energy Regulatory Commission.*
*Hearings and Appeals Office, Energy Department.*
*Intergovernmental and Institutional Relations Office (DOE).*
*Southeastern Power Administration.*
*Southwestern Power Administration.*
*Western Area Power Administration.*

**RULES**

Automotive propulsion research and development; review and certification of grants, etc., 55230
CFR Chapter headings revised, 53414
Coal loan guarantee program, 51958
Electric and hybrid vehicle research, development, and demonstration project:
Loan guaranties, 20477
Performance standards, 23500
Energy conservation; appropriate technology small grants program, 35023
Energy conservation program; appliances:
Air conditioners, central; correction, 24268
Furnaces and vented home heating equipment, 20154
Home heating equipment, unvented, 20131
Ranges, cooking tops, and ovens, conventional, and microwave ovens, 20118
Refrigerators, freezers, etc., efficiency improvement targets, 15147
Water heaters, home heating equipment, kitchen ranges and ovens, clothes washers, and furnaces, 47126
Water heaters; test procedures, 13865, 48986
Energy extension service program, 45541
Energy supplies, domestic; priority and allocation regulations, 6212
International voluntary agreements:
Recordkeeping requirements, 12854
Proceedings transfer to Energy Secretary and Federal Energy Regulatory Commission; LNG terminal facilities application, 21433
Seal and flag, 20783, 24666

**PROPOSED RULES**

Assistance regulations, 36962
Automotive propulsion research and development; review and certification of grants, cooperative agreements, etc., 31929, 37203
Coal loan guarantee program, 21682
Conduct standards, 48922
Conduct standards; avoidance of organizational conflicts of interest, 12727
Electric and hybrid vehicle research, development, and demonstration project; performance standards, 5841, 9284
Energy conservation; appropriate technology small grants program; establishment, 16185
Energy conservation, performance standards for new buildings; advance notice and meetings, 54511
Energy conservation program; appliances:
Furnaces; extension of time, 3571
Ranges, cooking tops, and ovens, conventional, and microwave ovens, etc.; correction, 6234
Test procedures, sampling requirements, 40192, 45375
Water heaters; test procedures; hearing, 13888, 21008
Energy extension service, National, 24316
Environmental Policy Act, National; compliance, 7232, 12333
Floodplain/wetlands environmental review requirements, compliance, 31108, 36461
Freedom of information, 40530
International voluntary agreements:
Recordkeeping requirements, 6608, 10572
Nondiscrimination in federally assisted programs, 53658
Petroleum allocation and price rules:
Motor gasoline, exemption; recommendations, 14491
Natural gas liquids and liquid products; maximum lawful price computation; inquiry, 28518, 31344
Normal business practices; inquiry, 57627
Procurement, 12727, 15853
Property management, 49636
Schools, hospitals, local government units, and public care institutions; grant programs, 58158
Seal and flag, 3128
Weatherization assistance for low-income persons, 34493

**NOTICES**

Accounting practices; oil and gas producers:
Inquiry, 3302, 7250
Reference to SEC proposal, 3156
Advisory committee review; inquiry, 8831
Advisory committees; closed meetings; reports, availability, 38614
Air pollution, new source performance standards; meeting, 48682
Applications for exception, etc.; cases filed with Hearings and Appeals Office, 15363, 16370, 16371, 17535, 23756
Authority delegations:
Economic Regulatory Administration, Administrator, et al.; natural gas importation and exportation, 47769
Federal Energy Regulatory Commission, 997, 7365
Resource Applications, Assistant Secretary; power and transmission marketing rates; confirmation and approval, 60636
Automotive propulsion research and development; contractor coordination meeting, 46891
Certification; appearance before DOE:
Davidson, Ronald C., Dr., 58851
Committees; establishment, renewals, terminations, etc.:
Energy Research Advisory Board, 24130
Food Industry Advisory Committee et al., 1524
Inertia Fusion Advisory Committee, 20855
National Energy Extension Service Advisory Board, 24726
National Industrial Energy Council, 1639
Personnel Security Review Board Panel, 58227
Public Utility Advisory Committee, 43380
Conduct standards:
Divestiture requirements; waivers granted; designation of certain employees, 3746, 9652, 11747, 20534, 24568, 25712, 25856, 41086, 48682, 59540
Consent orders:
Continental Oil Co. et al., 38925
Gulf Oil Corp., 34185, 38548
Kerr-McGee Corp., 7686, 21030
Standard Oil Co. of Calif. et al., 59431
Texaco Inc., 20856, 24902, 37480
Crude oil transportation system, Northern Tier and Inland States; inquiry, 17392, 19705
Energy conservation program; household appliances; inquiry, 25459
Energy conservation programs; meeting, 29978
Energy transportation study, National, 38795, 45974, 57998
Environmental statements; availability, etc.:
Bonneville Power Administration; proposed program for 1979 FY, 26462
Brookhaven National Laboratory, Upton, N.Y., 42778
Coal, low Btu, Gasification Facility and Industrial Park, Georgetown, Ky., 17857, 32321
Coal loan guarantee program, 11747, 36993
Crude oil price incentives, cumulative production/consumption effects, 21927
Dickey-Lincoln School Lakes Transmission Project, Maine, 14715, 15770
Fuels demonstration program, alternative, 1637
Fusion Materials Irradiation Test Facility, Hanford Reservation, Wash., 24118
Livermore Site, Livermore, Calif., 43379
Los Alamos scientific laboratory site, N. Mex., 29025
Miles City-Baker-Hettinger-New-Underwood 230-kv Transmission Line, Mont. et al., 39605
Mount Facility, Ohio, 17995
Naval Petroleum Reserve No. 1 (Elk Hills), Calif.; hearing, 27230
New Melones 230 kV electrical transmission line, Central Valley Project, Calif., 19289
Petroleum Feedstock, Baltimore Gas & Electric Co., 21714
Powerplants; notice of effectiveness for certain construction orders, 9843
Proton-Proton Storage Accelerator Facility, 7364
Reactor fuel, spent; storage, 39606
Rocky Flats Plant Site, Colo.; hearing, 17391
Second National Energy Plan; meeting, 46927
South Brawley Project, Calif.; Geothermal Loan Guarantee Program, 59539
Storage of spent power reactor fuel, 58408
Strategic petroleum reserves, Capline Salt Domes; Assumption, La., etc., 38926
Strategic petroleum reserves, Seaway Group Salt Domes, Tex., 31428
Strategic petroleum reserves, Sulphur Mines Salt Domes, La., 17027
Strategic petroleum reserves, Texoma Group Salt Domes, Texas, 57643
Waste isolation pilot plant; Carlsbad, N. Mex., 30331
Wind Turbine Generator System, R.I., 13606, 45632
Fuel economy of motor vehicles, 1979 gas mileage guide; availability, 53795
Geopressure geothermal industrial workshop, 6306, 16798, 29977
Improving Government regulations, 18634, 24215, 50812

Industrial energy conservation program; workshops, 48682
Information, confidential energy data; disclosure to other Federal agencies, alternative policies; hearings, 2653
Insulation and weatherization materials; criteria and installation practices, inquiry, 53494
Insulation materials and properties; meeting, 28228
International atomic energy agreements; civil uses; subsequent arrangements:
Argentina, 19447, 49048
Australia, 31431
Austria, 29163, 45631, 49048, 58227, 59902
Belgium, 49048, 60333
Brazil, 49559
Czechoslovakia, 49048
Denmark, 60333
European Atomic Energy Community, 37480, 41265, 45918, 49559, 58227, 59902, 60333
Finland, 49048
France, 31431, 33311, 49048, 60333
International Atomic Energy Agency, 28035
Italy, 49048
Japan, 29163, 31431, 37480, 45918, 49048, 51499, 53796
Netherlands, 49048, 58117
Norway, 45631, 49559
Peru, 19447
Romania, 31431, 58226
Sweden, 29163, 49048, 49559, 59902
Switzerland, 29163, 30862, 31431, 57179, 59902, 60333
United Kingdom, 31431, 45631, 49048
Venezuela, 58226
West Germany, 31431, 42035, 45631, 49048, 49559
International Energy Program:
Voluntary agreement and plan of action, 6134, 12060
Interpretation requests filed with General Counsel's Office, 6643, 11737, 16799, 19907, 25365, 29823, 34535, 40053, 46576, 53796, 59540
Meetings:
Air pollution, new source performance standards, 48682
Automotive propulsion research and development; contractor coordination, 46891
Concept Review Committee, 38615
Consumer Affairs Advisory Committee, 12059, 30611, 48012
Energy conservation programs, 29978
Energy Research Advisory Board, 49049
Energy transportation study, National, 49391, 49392, 49516, 57998
Food Industry Advisory Committee, 25712, 39605, 52052, 54984
Geopressure geothermal industrial workshop, 6306, 16798, 29977
Geothermal Energy Advisory Committee, 51131
High Energy Physics Advisory Panel, 31978
Industrial energy conservation program; workshop, 48682
Insulation materials and properties, 28228
Interagency Review Group, nuclear waste management, 30612
International Energy Agency Group of Reporting Companies et al., 8832
International Energy Agency Industry Advisory Board, 2917, 5878, 7364, 12060, 21715, 26346, 28036, 35744, 39411, 44565, 45631, 50732, 54125
International Energy Agency Industry Working Party, 4282, 10434, 17537, 25856, 47000
National Energy Extension Service Advisory Board, 32164, 34192
National Petroleum Council, 19289, 36676, 39410, 41085, 47606, 50013, 50237, 52760, 55436, 55449, 55815, 56930, 58609, 59902
Nuclear Waste Management, 38082
Seafloor Earthquake Measurement System, 1128
Second National Energy Plan, 46927
Solar, geothermal, electric and storage systems, 30112
Solar energy commercialization; conference, 19273
Solar energy policy, forums, 24569, 29346, 29347
Solar heating and cooling of buildings, model code, 15485
Thermal properties of building envelopes and insulation materials, National program plan; inquiry, 30862
Western New York Nuclear Service Center West Valley Study, 60637
Nuclear non-proliferation; establishment of procedures, 25326
Nuclear waste management, draft report; availability and inquiry, 48683, 53493
Nuclear waste management; Interagency Review Group; meetings, 30612
Organization, functions, and authority delegations:
Hearings and Appeals Office; establishment, 15485
Patent license, intent to grant:
Research for Braille Communications, 20534
Petroleum Marketing Practices Act:
Franchised distributors of motor fuel, protection of, 38743
Subsidization of motor fuel marketing; hearings and inquiry, 41422
Petroleum price regulations, mandatory:
Imported crude oil; landed costs, establishment, 34186
Refiners price rule; depreciation cost; Amoco request for interpretation, 3610
Power rate adjustments:
Public participation; Western Area Power Administration, interim rates and supplemental proceedings, 31, 1639, 12076, 14359
Privacy Act; systems of records, 6306, 18739, 32855, 39171
Regulatory agenda, semiannual, 50812
Solar, geothermal, electric and storage systems; meeting, 30112
Solar energy commercialization; conference, 19273
Solar energy policy, forums, 24569, 29346, 29347
Solar heating and cooling of buildings, model code; meeting, 15485
Southwestern Power Administration Administrator; salary adjustment, 18611, 46363
Thermal properties of building envelopes and insulation materials, National program plan; inquiry and meeting, 30862
Uranium enrichment services; termination charges, 17028, 19713, 58609
Uranium enrichment services criteria, 27886
Uranium hexafluoride; charges, enriching services, specifications, and packaging, 49831
Uranium hexafluoride; separative work and base charges, 51700
Weatherization assistance for low-income persons; OMB poverty income guidelines, 33797

## ENERGY INFORMATION ADMINISTRATION

### NOTICES

Commercialization program, meetings, 50965
Data collection forms; requirements review, 51497
Data collection reporting forms, discontinuance, 31962, 34524, 58851
Energy emergency management information system; inquiry, 46564, 51700, 52516
Energy information reporting requirements; inventory, 55437
Financial reporting system; report and hearing, 27056, 30091
Meetings:
Commercialization Program, 50965
National energy plan, 53094
National energy plan, meeting, 53094
Oil and gas reserves survey; estimates, production and ownership, etc., 6993, 10435, 14535
Owners of stored product report, discontinuance, 39410

## ENERGY RESEARCH OFFICE

### NOTICES

Meetings:
High Energy Physics Advisory Panel, 3173, 16222, 39411, 53494

## ENERGY TECHNOLOGY OFFICE

### NOTICES

Meetings:
Fossil Energy Advisory Committee, 22771, 24588, 38617, 60990
Geothermal Energy Advisory Committee, 3173, 3174, 23648, 36993, 36994
Nuclear waste disposal study; meeting, 8174
Western New York Nuclear Service Center Study (West Valley, N.Y.); report availability, conference, and hearing, 56100

## ENGINEERS CORPS

### RULES

Administrative procedures:
Exploratory drilling, Gulf of Santa Catalina, Calif., 28475
Hydroelectric power operations, coordination with power marketing agencies, 8258
Navigation lights, aids, charts and related data policy, 19661
Wrecks and other obstructions, removal, 22971
Boards, commissions and committees:
Mississippi River Water Control Management Board; establishment, 52236

Cultural resources; identification and administration; policies and procedures, 13990
Danger zones:
California, 20802, 49305
Engineering and design:
Land acquisition downstream from reservoir spillways, 35481
Power and communication lines over reservoirs, clearance, 14013
Flood control:
Federal participation in covered flood control channels, 47470
Reservoir projects; allocated storage use, 47184
Natural disasters procedures; emergency employment of Army and other resources, 1434
Navigation regulations:
Columbia and Snake Rivers, Oreg. and Wash., 3115
Cooper River and tributaries, S.C., 44840
Corpus Christi Bay, Tex., 30054
Fox River, Wis., 26570
Lake Washington Ship Canal, Wash., 14652
Los Angeles and Long Beach Harbors, Calif., 3275
Real estate, military; leasing, 29748
Real property:
Relocation assistance and real property acquisition policies; annual relocation assistance reports to GSA, elimination, 22356
Water and related land resources; environmental policy; feasibility studies; guidelines, 30222
Water resource use; establishment of objectives, 14014
Water resources policies and authorities:
Flood damage reduction measures in urban areas, 19804
Work for others; hydropower projects; investigation and supervision, 4979

PROPOSED RULES
Administrative procedures:
Fishing reefs, artificial; permit application evaluation guidelines, 6633
Port access routes in North Atlantic, 28523, 34162, 54269
Danger zone regulations:
San Miguel Island, Calif., 36283
Fishing and hunting; CFR Part removed, 3287
Navigation regulations:
Cooper River and tributaries, S.C., 31955
Corpus Christi Bay, Tex.; seaplane restricted area, 10942
Fox River, Wis., 14652
Puget Sound area, Wash., 31164
St. Johns River, Fla., 53045
Water resource development projects; public use, 5545
Water resource policies and authorities:
Federal participation in shore, hurricane, and tidal and lake flood protection, 3048
Floodplain management, 22306

NOTICES
Environmental statements; availability, etc.:
Saverton, Mo.; proposed plastics plant, 56087
Meetings:
Environmnetal Advisory Board, 46891

## ENGRAVING AND PRINTING BUREAU

RULES
Conduct on Bureau of Engraving and Printing grounds, 43459
Records, disclosure:
Appellate official, designation:, 60274

## ENVIRONMENT OFFICE, ENERGY DEPARTMENT

NOTICES
Meetings:
Global Environmental Effects of Carbon Dioxide Study Group, 7259, 32163

## ENVIRONMENTAL PROTECTION AGENCY

RULES
Air pollutants, hazardous; National emission standards:
Arizona; authority delegation, 20988
Asbestos, 26373
Authority citation changes:, 8800
California; authority delegation, 20988
Delaware; authority delegation, 6771
Minnesota; address, 10
Nevada; authority delegation, 20988
Rhode Island, authority delegation, 47692
Air pollution; standards of performance for new stationary sources:
Arizona; authority delegation, 20987
Authority citation changes, 8800
California; authority delegation, 20987
Delaware; authority delegation, 6771
Grain elevators, 34347
Kentucky; authority delegation, 3361
Kraft pulp mills, 7572, 34785
Lime manufacturing plants, 9453
Minnesota; address, 10
Nevada; authority delegation, 20987
Oxygen process furnaces, opacity standard, 15602
Petroleum refinery Claus sulfur recovery plants, 10868
Reference methods, 1495, 11984
Rhode Island, authority delegation, 47692
Steam generators, lignite-fired, 9278
Air pollution control, aircraft and aircraft engines:
Turbine engines, gas; NOx and NO2 emissions standards; effective date postponed, 12614
Air pollution control, new motor vehicles and engines:
Certification and testing for vehicles and engines, 43300, 57253
Fuel specifications, 31134, 33247
Northern Mariana Islands; motor vehicle importation and fuel use prohibitions; suspension, 47728
Selective enforcement auditing procedures, 4552, 4554
Technical amendments, 52914
Trucks and vehicles, light-duty; evaporative emission standards, 37972, 45583
Air programs; approval and promulgation; State plans for designated facilities and pollutants, 51393
Texas, 52241
Air programs; energy-related authority:
Delaware, 38703
Florida, 54248
Kansas, 14470
Virginia, 35922, 59840
Air programs; fuels and fuel additives:
Deregistration of motor oil and oil additives, 28490
Northern Mariana Islands; motor vehicle importation and fuel use prohibitions; suspension, 47728
Air quality control regions; criteria and control techniques:
Attainment status designations, 8964, 39101, 40420, 40502, 46003
Air quality implementation plans; approval and promulgation:
Prevention of significant air quality deterioration (PSD), 26403, 31134, 31232, 40010, 58188
Air quality implementation plans; approval and promulgation; various States, etc.:
Arizona, 759, 6945, 33246, 34132, 34470, 53034
California, 3277, 3279, 11817, 11819, 13879, 18174, 22721, 25673, 25675, 25676, 25679, 25680, 25681, 25683, 25684, 25686, 25689, 25691, 33915, 33917, 34464, 34466, 34468, 34470, 35695, 36247, 36249, 36625, 36627, 38826, 38827, 40013, 41033, 41034, 41036, 41037, 41038, 41040, 47727, 51633, 51767, 51768, 51770, 51772, 51773, 51774, 51775, 51776, 51778, 51780, 51781, 52238, 52703, 53037, 59064, 59065, 59488, 59492
Colorado, 44841
Connecticut, 44840
District of Columbia, 16178, 29559, 56663
Guam, 48639, 59067
Indiana, 26722
Kentucky, 3361
Louisiana, 36628
Maine, 14964, 15424
Maryland, 22719, 59495
Massachusetts, 1795, 11816, 12325, 22357, 26574, 40010, 44842, 56041
Minnesota, 10
Mississippi, 22358
Missouri, 25692, 28204
Nevada, 1342, 3278, 36932
New Jersey, 34131, 58567, 58569
New York, 17358, 36931
North Carolina, 44843
Ohio, 4259, 4611, 16736
Oklahoma, 9275, 13574, 52029
Oregon, 36931
Pennsylvania, 1070
South Carolina, 59496
Tennessee, 11820
Texas, 9276
Vermont, 33918, 59497
Virgin Islands, 4016
Virginia, 9604, 34130, 38700, 39367
West Virginia, 52240, 54247
Wisconsin, 53440
Wyoming, 48638, 51393
Air quality implementation plans; delayed compliance orders:
Florida, 59842, 60461
Idaho, 52704, 60465
Illinois, 60464
Indiana, 44844, 52706
Iowa, 51782, 51784, 52242, 52243, 60161
Kansas, 56226
Kentucky, 59497-59499
Maine, 47728, 52031, 59499
New Jersey, 54627

Ohio, 40015, 40226, 43298, 49537, 52030, 52705, 53038, 60403, 60462
Washington, 50681, 50682, 51783
Air quality implementation plans; delayed compliance orders; general procedures, 44523
Air quality implementation plans; preparation, adoption, and submittal:
Lead, National ambient air quality standard, 46269
Prevention of significant air quality deterioration (PSD), 26382, 31134, 31232, 40010
State implementation plans, nonattainment areas; approval criteria, 21673
Air quality standards, National primary and secondary:
Lead, 46258
Authority delegations:
Planning and Management, Assistant Administrator, publication of procurement regulations, 59068
Conduct standards:
Financial disclosure statements, 1338
Environmental impact statements, preparation of:
Water quality management program, 49792
Freedom of information; confidentiality of business information, 39999, 42251
Grants; general regulations and procedures
Administrative changes; OMB Circulars A-102 and 110 implementation, 28485
Grants, State and local assistance:
Hazardous waste management support grants, 43425
Reimbursement; eligibility dates extended, 7426
State management assistance grants, 17717, 21460, 42253
State public water system supervision program grants, 1494
Underground water source protection programs, 47131
Water treatment works construction, 1598, 17703, 21460, 28203, 44049, 56200
Grants; subagreements:
Administrative changes; OMB Circulars A-102 and 110 implementation, 28485
Procurement under EPA grants; minimum standards, 10342, 47975
Motor vehicle fuel economy:
Calculation and use of fuel economy values, labeling requirements, etc., 31134
Labeling program; inclusion of passenger cars in class of special purpose trucks, 38828
Light Trucks, 1979 and later model years; calculation and test procedures, 39373
Technical amendments, 52914
1979 and later model years, 21416, 26722
1980 and later model years; extension of time, 7983
Noise abatement programs:
Construction equipment; air compressors, portable; correction, 38705
Construction equipment; inspection and monitoring provisions, 27989
Practice rules; interim regulations, 34132
Transportation equipment, 1796, 12326, 27989
Ocean dumping:
Kwajalein Atoll, Marshall Islands; site designation, 33712
Requirements and criteria; correction, 1071
Organization and functions; revision, 28479
Pesticide applicators in States or on Indian reservations, Federal certification, 24837
Pesticide chemicals in or on raw agricultural commodities; tolerances and exemptions, etc.:
Aldicarb, 47729, 60465
4-Amino-6-(1,1-dimethylethyl)-3-(methylthio)-1,2,4-triazin-5(4H)-one, 41396
Aqueous extract of seaweed meal, 28491
Asulam, 12682
Bentazon, 14020, 15155, 35698, 44844
Bifenox, 41394
CIPC, 52487
Calcium hypochlorite etc., 36629
Carbaryl, 49305, 50429, 54090, 59068
2-((4-Chloro-6-(ethylamino)-s-triazin-2-yl)amino)-2-methylpropionitrile, 41396
Chlorothalonil, 22725
Dalapon, 22359
2,6-Dichloro-4-nitroaniline, 56042
O,O-Diethyl O-(2-isopropyl-6-methyl-4-pyrimidinyl) phosphorothioate, 26310, 35923, 36629
O,O-Dimethyl S-((4-oxo-1,2,3-benzotriazin-3(4H)-yl)methyl) phosphorodithiote, 42750, 51018, 60465
Dimethyl tetrachloroterephthalate, 29294
2,6-Dimethyl-4-tridecylmorpholine, 50176
Dioxathion, 36630
2-Ethoxy-2,3-dihydro-3, 3-dimethyl-5-benzofuranyl methanesulfonate, 14021
5-Ethoxy-3-trichloromethyl-1,2,4-thiadiazole, 22973
O-Ethyl O-(4-(methylthio)phenyl) S-propyl phosphorodithioate, 32133
Glyphosate, 57001
Gossyplure, 20803
Inert ingredients, 41392, 55403
Kepone, 3709
Magnesium phosphide, 56042
Malathion, 22974, 45584
N-(Mercaptomethyl) phthalimide S-(O,O-dimethyl phosphorodithioate), 46538
Methidathion, 44845, 45363
Methomyl, 25121, 35696
Oxamyl, 27836, 29946, 41395
Oxytetracycline, 35309, 50905
Simazine, etc., 1796, 29120
Sodium chlorate, 24692
Terbacil, etc., 1795, 28490, 35697, 38828, 49306
Thiabendazole, 41206, 55402
Tricyclazole, 54088
Pesticide programs:
Packaging guidelines; notification to Agriculture Secretary, 52031
Pesticide products; restricted use; labeling requirements, enforcement procedures, etc., 5790
Pesticide products, restricted use classifications, 5786
Registration guidelines; Agriculture Secretary notification, 34471
Reporting requirements; interpretation revoked, 37610
Pesticides; tolerances in animal feeds:
4-Amino-6-(1,1-dimethylethyl)-3-(methylthio-1,1,4-triazin-5(4H)-one, 35915, 41386
Bentazon, 44838
O-(4-Bromo-2-chlorophenyl-O-ethyl-S-propyl phosphorothioate, 33238
Butachlor, 2629
2-(m-Chlorophenoxy)propionic acid, 35687
3,5-Dimethyl-4-(methylthio)phenyl methylcarbamate, 29558, 40457
2-Ethoxy-2,3-dihydro-3, 3-dimethyl-5-benzofuranyl methanesulfonate, 14009
0-Ethyl 0-(4-(methylthio)phenyl) S-propyl phosphorodithioate, 22176, 32130, 34457
Glyphosate, 2630, 3359, 20489, 57002
Magnesium phosphide, 56040
Oxamyl, 41386
Pesticides; tolerances in food:
4-Amino-6-(1,1-dimethylethyl)-3-(methylthio-1,2,4-triazin-5(4H)-one, 35915
Dalapon, 22345
3,5-Dimethyl-4-(methylthio)phenyl methylcarbamate, 29558
O-Ethyl O-(4-(methylthio)phenyl) S-propyl phosphorodithioate, 22176, 32130, 34457
Glyphosate, 20489, 57002
Magnesium phosphide, 56040
Pollution control facilities, certification; rapid amortization, 1340
Procurement, 967, 1797, 9279
Public information:
Federal Insecticide, Fungicide, and Rodenticide Act, Treatment of information, 59061
Regulatory analysis statements, 47131
Toxic substances:
Chlorofluoroalkanes, fully halogenated; pesticide essential use exemption for total release or metered valve aerosol devices, 59500
Chlorofluoroalkanes, fully halogenated, used in aerosol propellants; manufacturing, processing, and distribution, 11324, 29001, 55241
Chlorofluoroalkanes, fully halogenated, used in aerosol propellants; reporting requirements, 11324, 29001
Civil penalties and revocation or suspension of permits; practice rules, 34730
Health and safety study reporting; submittal of studies for consideration by TSCA Interagency Testing Committee, 30986, 36249, 41206, 56663
Inventory reporting and general provisions; clarifications and meetings, 9254, 16178
Polychlorinated biphenols (PCBs), 7156, 33920, 50906
Waste management, solid:
Public participation; interim guidelines, 1903
Water pollution; effluent guidelines for certain point source categories:
Carbon black, 1344
Electroplating; hearing, 22360
Fertilizer manufacturing, 17826
Mineral mining and processing, 9809
Ore mining and dressing, 29774
Pesticide chemicals manufacturing, 17785, 44846
Phosphate manufacturing; revocation, 46020
Pretreatment standards, general; new and existing industrial users of POTWs, 27746
Rubber manufacturing, 6230
Steam electric power generating; relevance of economic factors, 43025, 44848
Sugar processing, 43304

Water pollution control:
Drinking water; interim primary regulation; implementation; violations, assessment of penalties, 5373
Hazardous substances; designation; list, 10479, 27533
Hazardous substances; determination of harmful quantities, 10493, 24310, 27534, 32764, 36628, 38008
Hazardous substances; determination of measurement units and penalty rates, 10498, 27534, 36628
Hazardous substances; determination of removability, 10489, 27533
Pretreatment standards for existing and new sources; CFR Part removed, 27746
Water pollution control; National discharge elimination system:
BAT requirement modifications; application deadlines, 40860
Consent decree requirements and veto procedures, 22162
Permits, short and long term options, 58067
Treatment works; 1977 statutory deadline for compliance; granting extensions criteria, 21270
Water quality standards; State programs:
Nebraska, 24531

**PROPOSED RULES**

Air pollution; ambient air monitoring reference and equivalent methods:
Lead, 46272
Air pollution; regional consistency for implementation of Clean Air Act; inquiry, 4872, 14072
Air pollution; standards of performance for new stationary sources:
Air quality surveillance and data reporting, 34892
Aluminum industry, primary, 42186
Electric utility steam generating units, 42154, 42183, 54959, 55258, 57834
Grain elevators, 34349
Major source categories; list, 38872
Petroleum liquid storage vessels, 21616, 21625, 22221
Air pollution control, aircraft and aircraft engines:
Turbine engines, large in-use gas; standards, 12615, 13588, 36978, 45411
Air pollution control, new motor vehicles and engines:
Motorcycles, new; selective enforcement auditing; inquiry, 1108
Air programs; approval and promulgation; State plans for designated facilities and pollutants, 29585
Idaho, 33749
Texas, 29805
Air programs; energy-related authority:
Delaware, 15339
Florida, 26456
Kansas, 3401
Virginia, 14973, 20823
Air programs; fuels and fuel additives:
Refineries, small, 17841, 24331
Air programs; fuels and fuel additives; registration:
Testing; health and emission protocols, and cost-sharing provisions; advance notice, 38607
Air quality control regions; criteria and control techniques:
Attainment status designations, 40436, 54960
Air quality implementation plans; approval and promulgation:
Air quality surveillance and data reporting, 34892
Photochemical oxidants; name change, 26985
Air quality implementation plans; approval and promulgation; various States, etc.
Alabama, 49327, 51649
Arizona, 28213, 38049
Arkansas, 46869
California, 2896, 2897, 2898, 4073, 4267, 4268, 6265, 6266, 6267, 8809, 12047, 13899, 13900, 13901, 14692, 16516, 20823, 22748, 23610, 24071, 28003, 28214, 32150, 32151, 35347, 38049, 39151, 40038, 40040, 43729, 46870, 50218
Colorado, 24071
Connecticut, 10708, 16350
Delaware, 45401
District of Columbia, 7670, 10709, 35072, 58593
Florida, 16350
Illinois, 17004
Kentucky, 14
Louisiana, 16351, 36114, 42282, 46870
Maryland, 15167, 22748, 28214, 30075, 36283, 52033
Massachusetts, 8810, 20514, 24857, 26757, 46553, 52747, 53472, 58203
Mississippi, 38735
Missouri, 4442, 8160, 27568
Montana, 40240, 50473, 57161
Nebraska, 14972
New Hampshire, 8161, 13902
New Jersey, 18216, 40039, 42019, 44552, 54269, 60303
New Mexico, 40245
New York, 20515
North Carolina, 19425, 30580
Ohio, 43729, 56060
Oklahoma, 27567
Oregon, 25146
Pennsylvania, 1967, 10707, 56060, 56910, 60305
Tennessee, 11834
Texas, 32440
Utah, 35952, 39152, 51817
Vermont, 8159, 35956
Virginia, 24858, 46554
West Virginia, 27208
Wyoming, 31044
Air quality implementation plans; delayed compliance orders:
Alabama, 35502, 35505, 45406, 45407
California, 32152, 50222
Colorado, 22749, 36649, 49822
Connecticut, 20023, 29805, 29807, 40247, 44866, 52752, 60624
Florida, 22221, 35506, 35508, 49330
Guam, 54274
Hawaii, 35957
Idaho, 32826, 44868
Illinois, 20022, 23004, 40539, 55427
Indiana, 16195, 21902, 36652, 38054, 39834, 40248, 50002, 50224, 54277, 57164, 58204, 59103, 59852, 60306
Iowa, 36654, 39152, 39153, 42283, 44867, 52255, 54275
Kansas, 35958, 50223, 59525
Kentucky, 23002, 33261, 33262, 34506, 38055, 41238, 41239, 43738, 50000
Louisiana, 56912, 58389
Maine, 26460, 29013, 29015, 36284, 45410, 52752, 53473
Maryland, 45405, 50221, 56915
Minnesota, 57306
Mississippi, 45402, 45403
Missouri, 57163
Nebraska, 31044, 43737, 54273
Nevada, 31956, 50921
New Jersey, 33754, 35503
New York, 19239, 33750, 33752, 52749
Ohio, 16195, 23611, 23612, 23614, 24858, 27865, 28004, 28006, 30581, 35960, 36651, 38050, 38056, 39397, 40041, 43334, 43736, 45408, 49327, 49329, 54277, 54278, 57306, 57926, 59526, 59527, 59528
Tennessee, 33259, 55427, 56913
Virginia, 44869, 47214, 49546
Washington, 23615, 25147, 37468, 51042, 52500, 52748, 57162
West Virginia, 43332, 43333, 43335, 43336, 43337, 43338, 43339, 45404, 45405
Air quality implementation plans; enforcement by State and Federal governments after statutory deadlines; proposal withdrawn, 43738
Air quality implementation plans; preparation, adoption, and submittal:
Air quality surveillance and data reporting, 34892
Intergovernmental consultation, 21466
Lead, 46272
Lead point sources; advance notice, 46275
Maryland, exemption from sulfur-content-in-fuel regulations, 9162
Photochemical oxidants; name change, 26985
Prevention of air pollution emergency episodes, 43331
Air quality standards, national primary and secondary:
Carbon monoxide; advance notice, 56250
Ozone and photochemical oxidants, 26962, 26971, 30315, 43331
Ambient air monitoring reference and equivalent methods:
Air quality surveillance and data reporting, 34892
Ambient air quality surveillance, 34892
Freedom of information, confidentiality of business information, 2637
Grants, State and local assistance:
Public participation in programs, 34794
State public water system supervision programs, 5390
Water quality planning, management, and implementation, 40742
Water treatment works construction, 17690, 21337, 24248, 24713
Motor vehicle fuel economy:
1979 and later model years, 6267, 6817
Noise abatement programs:
Pavement breakers and rock drills; noise emission standards; inquiry; meeting, 26589
Transportation equipment; motorcycles and motorcycle replacement exhaust systems, 10822, 12047
Ocean dumping:
Kwajalein Atoll, Marshall Islands; site designation, 5391

New York Bight Apex; site designation, 56061
San Nicholas Basin, Calif.; site designation, 8811
Secondary treatment requirements for discharges into marine waters, 17484, 20024, 20025, 39399
Pesticide chemicals in or on raw agricultural commodities; tolerances and exemptions, etc.:
Aldicarb, 47575, 57623
4-Amino-6-(1,1-dimethyl)-3-(methylthio)-1,2,4-triazin-5 (4H)-one, 28524
Ammonia, 56917
Bentazon, 20314
1,3-benzisothiazolin-3-one, 48658
Calcium hypochlorite etc., 25697
Carbaryl, 34163, 35963, 41240
2-((4-Chloro-6-(ethylamino)-s-triazin-2-yl) amino)-2-methylpropionitrile, 30314
Chlorothalonil, 19240
Dalapon, 9323
2,6-Dichloro-4-nitroaniline, 40250
O,O-Diethyl O-(2-isopropyl-6-methyl-4-pyrimidinyl) phosphorothioate, 15, 25837
O,O-Dimethyl S-((4-oxo-1,2,3-benzotriazin-3(4H)-yl)methyl) phosphorodithioate, 30582, 35348
O,O-dimethyl S-((4-oxo-1,2,3-benzotriazin-3(4h)yl)methyl)phosphorodithioate, 49547
Dimethyl tetrachloroterephthalate, 16352
2, 6-Dimethyl-4-tridecylmorpholine, 22751
Dioxathion; codex tolerances, 27866
2-Ethoxy-2, 3-dihydro-3, 3-dimethyl-5-benzofuranyl methanesulfonate, 7671
5-Ethoxy-3-trichloromethyl-1,2,4-thiadiazole, 9165
Glyphosate, 57003, 57004
Inert ingredients, 29809, 42769
Malathion, 9163, 33264
N-(Mercaptomethyl)phthalimide S-(O,O-dimethyl phosphorodithioate), 36655
Methidathion, 33263
Methomyl, 12725, 21700, 24861
Metolachlor, 60624
Oxytetracycline, 34804
Parathion, 45412
Parathion or its methyl homolog, 24714
Sodium chlorate, 10943
Terbacil, 20246, 35349
Pesticide programs:
Certification of usefulness, pesticide chemicals, 29696
Exemption and registration procedures, 47215
Packaging, special; registrants list, 3401
Pesticide products, conditional registration, 32154, 46555
Registration guidelines, 5857, 6973, 11590, 16517, 29696, 37336, 39644
Pesticides, tolerances in animal feeds:
4-Amino-6-(1,1-dimethylethyl)-3-(methylthio)-1,2,4-triazin-5 (4H)-one, 28522
2-Ethoxy-2, 3-dihydro-3, 3-dimethyl-5-benzofuranyl methanesulfonate, 7653
Glyphosate, 57005
Pesticides; tolerances in food:
Dalapon, 9319
Glyphosate:, 57005
Public participation in programs; resource conservation and recovery, safe drinking water, and clean water, 34794
Regulatory process, public participation in; water pollution programs, various; advance notice, 20821, 22060
Toxic substances:
Chlorofluoroalkanes, fully halogenated, used in aerosol propellants; total release and metered valve aerosol devices; exemption, 42770
Civil penalties and revocation or suspension of permits; practive rules, 34738
Confidentiality of business information, 2637
Health and safety study reporting; submittal of studies for consideration by TSCA Interagency Testing Committee, 4073
Polychlorinated biphenyls (PCBs); manufacturing, processing, distribution, and use ban, 24802, 38057, 43048
States, cooperative agreements; availabillity of funds, 38466
Waste management, solid:
Confidentiality of business information, 2637
Disposal facility classification criteria, 4942, 7988, 12726, 17374
Hazardous waste guidelines and standards, 4366, 18506, 29908, 58946, 59022
Public participation; CFR Part removed, 34794
State plans, guidelines for development, 38534
Water pollution; effluent guidelines for certain point source categories:
Best conventional pollutant control technology, 37570, 39062, 50226, 50227
Electroplating, 6560, 9324, 16517, 26042, 33940
Steam electric power generating; relevance of economic factors, 8812
Water pollution control:
Drinking water; interim primary regulations; control of organic chemical contaminants, 5756, 9163, 10942, 13077, 19055, 25838, 29135
Hazardous substances; designation; list, 10506, 27569
Hazardous substances; determination of harmful quantities; list additions, 10506, 27569
Hazardous substances; determination of measurement units and penalty rates; list additions, 10506, 27569
Hazardous substances; determination of removability; list additions, 10506, 27569
Hazardous substances pollution; spill prevention and control countermeasure plans, 39276
Public participation; CFR Part removed, 34794
Water pollution control; National discharge elimination system and State program elements:
Best management practices for on-site industrial activities, 39282, 47213
Consent decree requirements and veto procedures, 1256
Permits, short and long term options, 22167
Water pollution control; National pollutant discharge elimination system, 37078, 47213
Water pollution programs, various; public participation in regulatory process; advance notice, 20821, 22060
Water quality standards; development; policy and inquiry, 29588
Water quality standards; State programs:
Alabama, 43741
Mississippi; dissolved oxygen criteria, 30076, 35735

NOTICES

Advisory committee review; inquiry, 4673
Air pollutants, carcinogenic; regulation; meeting, 5565
Air pollutants, hazardous; National emission standards:
Arizona; authority delegation, 21031
California; authority delegation, 21031
Delaware; authority delegation, 6647
Massachusetts; authority delegation, 39854
Minnesota; authority delegation, 33
Nevada; authority delegation, 21031
Oregon; authority delegation, 20055
Rhode Island; authority delegation, 47690
Air pollution; ambient air monitoring reference and equivalent methods applications:
14 B/E Chemiluminescent NO-NO-NOx analyzer, 23650
CO monitor, 13094, 58429
Hydrogen ion (pH) and ammonia, 38618
Model 2000 Ozone Meter, 40055
Nitrogen oxides analyzer, 7473
Sulfur dioxide analyzer, 14721, 33311, 35995, 38088, 50733
Air pollution; standards of performance for new stationary sources:
Arizona; authority delegation, 21031
California; authority delegation, 21031
Delaware; authority delegation, 6647
Kraft pulp mills; total reduced sulfur emissions; guidelines, 7597
Massachusetts; authority delegation, 39854
Minnesota; authority delegation, 33
Nevada; authority delegation, 21031
Oregon; authority delegation, 20055
Air pollution control:
California emergency plan; guideline, availability, 38618
Clean Air Act, administration; nonexempt Federal contracts, grants and loans; list of ineligible violating facilities, 11750, 14097, 25468
Clean Air Act; local or regional economic disruption and unemployment prevention in Ohio, 60652
Exxon Corp., Platform Hondo; applicability of Clean Air Act determination, 16393
Hydrocarbon technology, for motor vehicles; cost effectiveness and feasibility analysis, 27892
Air pollution control, new motor vehicles and engines:
California; waivers, 998, 1533, 1829, 9344, 15490, 17044, 19447, 20549, 25729, 29615, 32182, 36679
Diesel engine technology, 1981 NOX emission standard; waiver applications, guidelines, 30341
Federal certification test results, 1978 FY, 41538
1981 automobile CO emission standards, 47272
Air programs; fuels and fuel additives:
Alcohol-gasoline blends waivers; guidelines, 24131
Arconol; hearing, 38621
Gasohol, arconol, and MTBE; enforcement suspension, 44565

Gasohol (ethanol-gasoline blends) and methyl t-butyl ether waivers; hearing, 36686
Lead phase-down standard, 4110
Lead phase-down standard; suspension applications, 20550, 21937
Methyl cyclopentadienyl manganese tricarbonyl (MMT); waiver, 24742, 41424
Waiver guidelines, 11258
Air quality criteria; external review drafts; availability:
Arsenic, 18246
Cadmium, 23648
Carbon monoxide, 58117
Coke oven emissions exposure, 16546
Nitrogen oxides; extension of time, 1405
Oxides of nitrogen, 58117
Photochemical oxidants, organic, 5884
Polycyclic organic matter, 23649
Air quality implementation plans; approval and promulgation:
Ohio; coal, low-sulfur, from Central Appalachia; short-term supply and demand; report availability and inquiry, 33312
Ohio, coal burning power plants; report availabillity, 51842
Ohio; economic disruption, inquiry and hearings, 30113
Ohio, sulfur dioxide sources; acceptable fuel sampling analysis methods, 6646
Prevention of significant air quality deterioration (PSD); petitions for review, 9529, 31232, 36322, 40056, 47772
Vapor recovery; gasoline stations; stage I; Dallas - Fort Worth area, 40057
Air quality planning grants, urban; availability and inquiry, 60215
Air quality research study; Houston, Tex., 29986, 31067, 33820
Air quality standards:
Nitrogen dioxide; meeting, 12753
Arsenic exposures, atmospheric; documents assessing public health consequences; external review drafts; availability, 58622
Chlorofluorocarbons; nonpropellant uses; meeting, 1986, 4676
Chrysler Corp., recall order:, 56101
Committees; establishment, renewals, terminations, etc.:
Air Pollution Control Techniques National Advisory Committee, 56276
Clean Air Scientific Advisory Committee, 38618
Interagency Toxic Substances Data Committee, 22776
Municipal Construction Division Management Advisory Group, 55278
Toxic Substances Advisory Committee, 4673
Consultants, payment policy, 5565
Diesel emission health effects research plan, meeting, 56934
Environmental programs, air and water pollution, pesticides, etc.; public participation in regulatory process; subject list, 14602
Environmental statements; availability, etc.:
Agency statements, weekly receipts, 1403, 1988, 2923, 3759, 3933, 4673, 5425, 5430, 5879, 6140, 6315, 7473, 7699, 8844, 9856, 11260, 12375, 13621, 14727, 15772, 17045, 18247, 19450, 20550, 20860, 21720, 22772, 24380, 25182, 26124, 27234, 27600, 28549, 29624, 30614, 31983, 33318, 34838, 35385, 35996, 37009, 38464, 39632, 41429, 42036, 43384, 45636, 47607, 49358, 49846, 50966, 51720, 52768, 54133, 55281, 56722, 57968, 58622, 58857, 60225
Feed additive petitions:
Permethrin, 43383
N-phenyl-N'-1,2,3-thiadiazol-5-ylurea and its aniline-containing metabolites, 51131
Food additive petitions:
Aldicarb, 40914
Aluminum phosphide, 20051, 35385, 40309
4-Amino-6-(1,1-dimethylethyl)-3-(methylthio)-1,2,4-triazin-5-(4H)-one and its triazinone metabolites, 33961, 37489
Baygon, 54989
Bendiocarb, 54989
O-(4-Bromo-2-chlorophenyl) O-ethyl S-propyl phosphorothiate, 16400, 22775
Chemagro Agricultural Division, 9343
2-Chloro-1-(3-ethoxy-4-nitrophenoxy)-4-(trifluoromethyl) benezene, 53057
N,N-Dimethylpiperidinium chloride, 24130
O,S-dimethyl phosphoramidothioate, 51132
O-Ethyl O-(4-(methylthio)-phenyl) S-propyl phosphorodithioate, 19077
Glyphosate, 19449
Inter-Regional Research Project, 5425
2-Methyl-2-(methylsulfanyl)propanol O-(methylamino)carbonyl)-oxime, 18246
Oxamyl, 34203
Paraquat, 16400
Parathion, 22775
Pendimethalin, etc., 58430
Pirimiphos methyl, 60652
2-(4-Thiazolyl)benzimidazole, 31432
Trichloroisocyanuric acid, etc., 21937
Tricyclazole, 19449
Grants, State and local assistance:
Air quality technical demonstration program, 38926, 40309
Clean lakes grants assistance, 29617
Minority construction contractors utilization, 24908
Pesticides, training and certification of applicators, 7260
Protests of procurement actions, treatment works construction; subject index list, 29086
Resource recovery project development grants, urban policy; inquiry, 33670
Sewage treatment works; construction; Buy American, 14722
Trust Territory of Pacific Islands and Northern Mariana Islands; water quality management, 49559
Water treatment works, construction; toxicity of chemical grouts for sewer rehabilitation; program requirements memorandum, 21504
Water treatment works, increased use of minority consultants and construction contractors; policy statement, 60220
Improving Government regulations, 14602, 23679, 29891, 51131, 56158
Interagency Regulatory Liaison Group:
Testing standards and guidelines, 1523, 1987
Work plans and meetings, 7174
Meetings:
Administrator's Toxic Substances Advisory Committee, 1985, 7259, 14721, 23648, 24593, 40910, 52768
Air pollutants, carcinogenic; regulation, 5565
Air Pollution Control Techniques National Advisory Committee, 11259, 26797, 32461
Air quality, Houston, Tex., 29986, 31067
Chlorofluorocarbons; nonpropellant uses, 1986, 4676
Diesel emmission health effects research plan, 56934
Drinking Water National Advisory Council, 3313, 18018, 30882, 49845
Environmental Health Advisory Committee, 53057
Environmental Pollutant Movement and Transformation Advisory Committee, 45636
FIFRA Scientific Advisory Panel, 35, 2663, 8292, 14721, 19449, 21504, 22775, 32185, 41429, 47609, 50501, 52282, 56934
Hazardous waste regulatory program; industry meeting, 23650
Interagency Toxic Substances Data Committee, 22776, 26345, 38926, 58622
Municipal Construction Division, Management Advisory Group, 1128, 5564, 27602, 53495
National Air Pollution Control Techniques Advisory Committee, 58227
National pollutant discharge elimination system permit program, 37008
Nitrogen dioxide National ambient air quality standard, 12753
NPDES permit program, 6317
Nuclear Waste Management Interagency Review Group; public input, small group discussions, 29828
Oncogenicity and chronic toxicity testing standards, 34841
Radioactive wastes, environmental protection criteria for, 2223
Resource conservation and recovery; solid and hazardous waste management, 36323
Resource Conservation Committee, 12377, 19291, 22442, 24384, 25186, 29616, 40313
Resource recovery project development grants, urban policy; inquiry, 33670
Science Advisory Board, 1986, 2665, 4887, 5051, 6319, 7699, 10730, 10731, 12081, 13094, 15187, 17045, 17399, 19291, 20277, 23012, 23013, 25181, 26123, 26797, 29028, 30121, 31067, 32185, 43765, 44565, 47279, 48013, 50735, 53816, 55819, 57656, 58428, 58626, 60226
State FIFRA Issues Research and Evaluation Group, 48706, 52283
State-Federal FIFRA Implementation Advisory Committee, 1533, 9344
Toxic substances control; substantial risk reporting; inquiry, 50503
Water planning and standards program, 10730
Water pollution control; construction grants program, 3174, 7473
Water pollution control; secondary treatment requirement modification, 4675
Water supply-wastewater treatment coordination study; workshops, 58626
Wetlands solid waste disposal facilities, 53495
Noise pollution:
Noise environment assessment guidelines; inquiry, 28549

Nonnuclear energy research and development, environment and conservation; hearing, 1988, 6646
Ocean dumping:
Bioassay procedures for permit program manual, availability, 28249
Secondary treatment requirements for discharges into marine waters, 33820
Pesticide application; "low volume" and "ultra-low volume" method; inquiry, 54697
Pesticide applicator certification; Federal agency plans:
DOD plan, 25468
Pesticide applicator certification; States or Indian reservations; notification to USDA, 12082
Pesticide applicator certification and interim certification; State plans:
Alaska, 3757
Arizona, 2925
Colorado, 6648, 18019, 28249
Delaware, 6320
District of Columbia, 57656
Hawaii, 22443
Illinois, 20864, 32327
Louisiana, 34536
Maryland, 12371
Minnesota, 43765
Mississippi, 46899
Missouri, 1988
Nebraska, 10727, 13434, 47279
New York, 3761
Oklahoma, 42302
Puerto Rico, 9653
Rhode Island, 14107
South Carolina, 8294
Tennessee, 1405
Vermont, 12082
Washington, 13434
Wisconsin, 55462
Wyoming, 3435, 7699
Pesticide registrant reporting requirements; interpretation, 37611
Pesticide registration applications, 7019, 7021, 7022, 7023, 9856, 12935, 13915, 15001, 15487, 15488, 16400, 16402, 17397, 17398, 19447, 20052, 21505, 22776, 23650, 24384, 25184, 25470, 30121, 30341, 36677, 38084, 38085, 38933, 38935, 39173, 40309, 40313, 41269, 42298, 42300, 43382, 46078, 55278, 59432
Pesticide uses, restricted; classification procedures; reprint availability, 17399
Pesticides; intensive scientific review ingredient list, 16807, 30613, 37749
Pesticides; tolerances, registration, etc.:
Acephate, etc., 29622, 36683
Aldicarb, etc., 4886, 7019, 29824, 31232, 32181, 33316, 44884
Ambush, etc., 14099, 46577
4-Amino-6-(1,1-dimethylethyl)-3-(methylthio)-1,2,4-triazin-5-(4H)-one and its triazinone metabolites, 33961, 35999, 36684, 37489, 41268, 47001
Amitraz, 33962
Arsenic, inorganic;, 48267, 54290
Asulox, 36681
Atrazine, 36682
Avitrol, 29356, 29623
Azinphos methyl, 35744
BAAM (Amitraz), 5884, 14100
Benomyl, 1835, 6320, 14098, 24739, 28250, 30340
Bentazon, 3434, 33313, 36676
Benzene hexachloride (BHC), 31432
Bifenox etc., 12751, 56934
Bonide Paris Green Pellets, etc., 5567, 9201, 13915, 14727
Botran 75W, 42039, 47281
Bromide chloride, etc., 35998
3-(3-(4-Bromo(1,1-biphenyl)4-yl)-3-hydroxyl-1-phenypropyl)-4-hydroxy-2H-1-benzopyran-2-one, 9342, 16399, 16400, 33315, 52282
Butachlor, 2664, 38085, 38933, 41424
Cadmium; correction, 15186
Captafol, etc., 26796
Carbaryl, 36685
Carbofuran, 35745
Carzol, 29358
2-Chloro-1-(3-ethoxy-4-nitrophenoxy)-4-(trifluoromethyl)benzene, 16405, 38085, 40917
5-Chloro-3-methyl-4-nitro-1H-pyrazole, 54289, 55461
Chlorobenzilate-containing products, 29824
2-(m-Chlorophenoxy)propionic acid, 35747
N-(((4-Chlorophenyl)amino) carbonyl)-2,6-diflourobenzamide, 35385
S-(4-Chlorophenyl)methyl) diethylcarbamothioate, 12081, 29187
Chlorpyrifos etc., 40914
Cidial E-4, 38084
Coal tar, creosote, and coal tar neutral oils, 48154, 54289
Cyano (3-phenoxyphenyl) methyl-4-chloro-alpha-(1-methylethyl) benzeneacetate, 9343, 19290, 47606
Cyclic methylene (diethoxyphophinyl) dithioimidocarbonate, etc., 49362
Cyclic methylene (diethoxyphosphinyl) dithioimidocarbonate, 46077
Cyhexatin, 42038
Cytokinin-like activity equivalent etc., 8293
2,4-D, 40916, 44885, 49364
DDT, 29987
Diazinon, 60224
Dibromochloropropane (DBCP), 23649, 40911, 50042
2-(4(2,4-Dichlorophenoxyl) phenoxy) propanoate, 17398
Diethanolamine salt of mefluidide, etc., 36000
Difenzoquat, 59126
3,5-Dimethyl-4-(methylthio)phenyl methylcarbamate, 29619, 40545, 43380
O,O-Dimethyl O-(4-nitro-m-tolyl phosphorothioate, etc., 51132, 56101, 56934
Dinitro Technical and Ancrack Herbicide, 50965
Dinoseb, 27891, 27892
N-((4(Dipropylamino)-3,5-dinitro-phenyl)sulfonyl)-S,S-dimethyl-sulfilimine etc., 9342
Diquat, 46077
Diquat, etc., 43381
Endrin, 51132
Ethanedial dioxime; reextension of temporary tolerance, 1405
Ethoprop, 12752
2-Ethoxy-2, 3-dihydro-3, 3-dimethyl-5-benzofuranyl methanesulfonate, 20051
Ethyl alpha-((dimethoxy-phosphinothioyl)thio) benzeneneacetate, etc., 36688, 40918
O-Ethyl O-(4-(methylio)phenyl) S-propyl phosphorodithioate; extension, 22241, 25181
Ethyl parathion, 35746, 38928
Ethylene dibromide (EDB); extension of time, 4676
Ethylene oxide, 3801, 9343
Ferriamicide Bait, 24593
Ferriamicide for imported fire ant control, 38084, 47774, 48012, 60334
Freers Elm Arrester; inquiry, 45632
Glyphosate, etc., 1835, 2664, 3434, 7019, 8292, 11750, 19077, 20549, 47606, 49364, 49846, 56935, 59431
Goal 2E (NBFT), 24905, 43384
Gossyplure, 1835, 18018
Guthion, 33315, 40056
GYPCHEK, 20550
Heptachlor, 6317, 12372
Hercon Luretape Cotton Boll Weevil, 36684
Hexadecyl cyclopropanecarboxylate, 29619
HEXAKIS (2-methy-2-phenylpropyl)-distannoxane; withdrawn, 19291
Hexazinone, 56935
Hirsutella thompsonii, 16404
Imperial Weed & Grass Killer, etc., 60334
Isopropyl palmitate, 20051
Johnson's Diaper Liners, etc., 26347
Malathion, 40916
Mefluidide, 49365
Melfluidide, 46077
N-(mercaptomethyl) phthalimide S-(O,O-dimethyl phosphorodithioate), 54291
Mesurol, 38931, 40915
Metalachlor (2-chloro-N-(2-ethyl-6-methyl-phenyl)-N-(2-methoxy-1-methylethyl) acetamide and its metabolites, 33962
Methidathion, 8844, 3331i
Methomyl, 51445, 51446, 59125
2-Methyl-2-(methylsulfonyl) propanal O-((methylamino)carbonyl) oxime, 8029, 16400
Methyl parathion, 36000
Methyl 2-(4-(2,4-dichlorophenoxy)phenoxy) propanoate and its metabolites, 14721, 16404, 28036, 29620
Metolachlor, etc., 5425, 5564, 60651
Metribuzin, 12081, 20050, 36680
Naled, 1834
Nonflurazon, etc., 10971, 60666, 60667
Nortron, 3757, 15188, 19290
Ortho Phosdrin 2 Dust, etc., 35099
Oryzalin, etc., 2662, 15486, 15487
Oxadiazon, etc., 22775, 35999, 36000, 45919
Oxamyl, etc., 28546, 28548, 31432, 43381, 58429, 58430
Oxyfluorofen, etc., 40058, 46576
Paranitrophenol, 52517
Paraquat, 6319, 9341, 24737, 59127
Pendimethalin, etc., 42297, 58430
Pentachlorophenol (PCP) and its derivatives, 48443, 54290
Permethrin, etc., 4285, 8293, 10971, 38932, 41086, 49363, 51445, 51446, 52516, 59126
Phytophora citrophthora MWV isolate, 42297, 49363
Preferred Bird and Squirrel Repellent Formula 3906 L, 25866
Prodiamine, 52283
Profluralin, 10970
Propanil, etc., 33316, 51132
Propylene, 55462
Pydrin, 12752, 24738, 24741
Restricted use products; cancellation, 28774, 40917, 51708
Rozol Meadow Vole Bait, 36684
Rozol Tracking Powder, 36683
Sodium azide, 16404

Sodium cyanide, 28546, 44884
Sodium monofluoroacetate, 14100
Strychnine, 29621, 38929
Talon Rodenticide Pellets, etc., 45918
Tebuthiuron, etc., 43380
Tepp, 42037
Terbacil, 5564
Terramycin, 24740, 24903, 24904, 24905, 24906, 29828, 33314, 46579, 46580
Thiabendazole, etc., 18246, 43383, 50502, 50504
Thiophanate-methyl; extension of time, 3939
2,4,5-Trichlorophenol and salts, 34026
2,4,5-Trichlorophenoxyacetic acid, 17116, 19291, 24379, 24743, 29829, 41268, 41269
Tricyclazole, 54133, 57968
Trifluralin, etc., 16405, 29620
Triforine, 20055, 28547, 29623, 36514
Triphenyltin fluoride, 20052
Velpar weed killer, 45474
Vinyzene, 60652
Wood preservative pesticides; schedule for review, 48154
ZOCECON, 11851
ZP Tracking Powder, 25181, 33316
Plant closings attributable to environmental regulations (Economic dislocation early warning system); information request, 50244
Privacy Act; systems of records, 3502, 40057
Radiation protection guidance to Federal agencies for diagnostic x rays, 4377
Radioactive wastes, environmental protection criteria for, 2223, 53262
Regulatory agenda; semiannual, 56158
Regulatory reform initiatives; quarterly report and inquiry, 47001
Solid waste; management, treatment, etc.:
Resource recovery project development grants, urban policy, 33670, 47944
State grants for surface impoundment assessment; availability, 9344
Toxic and hazardous substances control:
Business information, confidential; interim procedures, 1836
Business information, confidential; security manual, availability, 32186, 53817
Chemical substances for commercial use, inventory reporting policy; form; inquiry, 49688
Chemical use list; inquiry, 32222
Chemicals, candidate list; availability; addendum, 1987, 5051
Hazardous waste regulatory program, industry meeting, 23650
Health and safety studies, denial of petition by Manufacturing Chemists Association, 56724
Oncogenicity and chronic toxicity testing standards; meeting, 34841
Polychlorinated Biphenyls (PCBs); approved disposal facilities, list, 30882, 38087, 50041, 59432
Polychlorinated biphenyls (PCBs) and fully halogenated chlorofluoroalkanes; preliminary exportation guidelines, 24818
Security of confidential business information; draft procedures availability and inquiry, 13915
Substantial risk notification; interpretation, 1110
Substantial risk reporting; meeting; inquiry, 50503
Toxic pollutants; list, 4108
TSCA Interagency Testing Committee recommendations; response, 50134
TSCA Interagency Testing Committee report to EPA, 3434, 11852, 16684, 24907, 50140, 50630
Transportation measures and mobile source emission factors; documents, availability, 29987
Waste management, solid and hazardous:
Regulatory program, meeting, 36323
Water for drinking or culinary purposes on interstate carrier conveyances; memorandum of understanding with FDA, 43065
Water integrity; symposium report availability, 2663
Water planning and standards program; meeting, 10730
Water pollution; discharge of pollutants:
Illinois, 43380
Indiana, 36323
Iowa, 24379
Oregon, 26610
Pennsylvania, 18017, 20549
Water pollution; effluent guidelines for certain point source categories:
Best conventional pollutant control technology; variance clauses interpretations withdrawal, 50042
Concrete products; industry guidance development; availability, 16393
Water pollution control:
Chemical oxygen demand, approval of alternate test procedure, 9341
Clean lakes grants assistance, 29617
Construction grants program; meetings, 3174, 7473
Conventional pollutants; list, 32857
Data collection; schedule of surveys, 29355
Federal Water Pollution Control Act, administration; nonexempt Federal contracts, grants, and loans; list of ineligible violating facilities, 11750, 14097, 25468, 40911
Interim national municipal policy and strategy; availability, 47774
Pollutants suitable for calculation of total maximum daily loads, identification, 42303, 60662
Safe drinking water; review of variances and exemptions, 30341, 53057
Safe drinking water; underground injection control program; State list, 43420, 45919
Secondary treatment information; wastewater treatment ponds suspended solids limitations, 53161, 55279
Secondary treatment requirement modification; meeting, 4675
Treatment works, publicly owned; sampling and analytical procedures, 26126
Water supply-wastewater treatment coordination study; workshops, 58626
Water pollution control; discharges into marine waters; modification of secondary treatment requirements; preliminary applications, 47786
Water pollution control; safe drinking water; public water systems designations:
Alaska, 37488
Arizona, 38083
California, 8029, 25180, 36687
Colorado, 14537
Connecticut, 36324
Delaware, 8589
Florida, 2665, 40055
Guam, 17868, 35534
Idaho, 5566, 8027
Kansas, 8027
Maine, 36324
Maryland, 1985
Michigan, 5051
Montana, 8028
Nevada, 8030
New Hampshire, 18611, 26478, 38618
New Mexico, 8590
New York, 26611
North Dakota, 2663
Pacific Islands Trust Territory, 35534
Rhode Island, 18611, 19713, 26479, 56276
South Carolina, 53816
Washington, 5566, 8028
West Virginia, 8589
Wisconsin, 4109, 11851
Water quality, criteria, 2665, 21506, 24593, 29028
Water quality analysis; memorandum of agreement with FDA, 44884, 57658
Water quality standards:
Marine waters; availability, 13914
State; adoptions and approvals, 11851, 18247
Wetlands solid waste disposal facilities, meeting, 53495

## ENVIRONMENTAL QUALITY COUNCIL

**RULES**
National Environmental Policy Act; implementation; procedural provisions, 55990

**PROPOSED RULES**
National Environmental Policy Act; implementation; procedural provisions, 25230

**NOTICES**
Committees; establishment, renewals, terminations, etc.:
Interagency Toxic Substances Data Committee, 22776
Freedom of information index requirements:
Quarterly index; revised, 49557
Improving Government regulations, 22593, 54121
Meetings:
Interagency Toxic Substances Data Committee, 22776, 26345, 58622
Toxic Substances Strategy Committee, 8829, 36990, 39167
TSCA Interagency Testing Committee, 1817, 14712, 15480, 21030

## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

**RULES**
Employee selection procedures; uniform guidelines, 38312
Equal employment opportunity in the Federal government; transfer of functions from Civil Service Commission, 60901
Freedom of information; fee schedule, 40223
Procedural regulations:
Charges deferred to appropriate State and local agencies; designated 706 agencies, 39776

Commission withdrawal of charge, negotiated settlement, etc., 30798
Discrimination charges; filing time, 50428

PROPOSED RULES
Employee selection procedures; uniform guidelines; hearing and meeting, 1506, 9131, 11812, 14955
Freedom of information; fee schedule, 26454
Procedural regulations:
Charges deferred to appropriate State and local agencies; designated 706 agencies, 22220, 39831
Records and reports; record retention, 32280
Remedial and/or affirmative action guidelines; final action delay, 16349

NOTICES
Employment nondiscrimination; memorandum of understanding with FCC, 12936, 15493, 38109
Equal employment opportunity in the Federal government; transfer of functions from Civil Service Commission, 60998
Improving Government regulations; inquiry, 22610, 24212
Meetings; Sunshine Act, 1883, 2812, 3791, 4748, 7518, 8344, 12986, 13484, 13656, 14598, 14794, 16881, 17112, 18128, 18399, 19103, 19985, 20367, 20611, 21407, 21976, 23084, 24653, 25224, 25770, 26183, 27282, 27639, 27954, 28328, 29246, 30027, 30981, 32368, 33372, 34024, 35789, 36758, 37535, 37732, 38504, 38991, 39479, 39924, 40100, 40349, 40600, 41333, 41465, 42347, 42851, 42852, 43083, 43813, 44611, 44965, 45510, 46155, 46625, 48098, 49106, 50280, 50985, 51896, 52090, 54174, 54775, 55055, 55561, 56153, 56755, 56996, 57717, 58225, 59243, 59244, 59611, 11298A
Meetings; Sunshine Act; EEOC operations report as standing agenda item, 27234
Privacy Act; systems of records, 30347
Privacy Act; systems of records; annual publication, 19634, 39930
Records and reports:
Apprenticeship information report; extension of filing deadlines, 7025, 14359, 30883
Employer information report; extension of filing deadlines, 14360, 34203
Local union information report; extension of filing deadlines, 7025, 14360, 30883
Local union report and apprenticeship information reports; waiver for 1977 calendar year, 49365
State and local government information report; extension of filing deadlines, 43386
Religious discrimination; work scheduling and employee religious needs; hearing, 9127, 11957, 14360

## EXECUTIVE OFFICE OF THE PRESIDENT

*See Administration Office, Executive Office of President.*
*Central Intelligence Agency.*
*Environmental Quality Council.*
*Foreign Language and International Studies, President's Commission.*
*Management and Budget Office.*
*Science and Technology Policy Office.*
*Telecommunications Policy Office.*
*Trade Negotiations, Office of Special Representative.*
*Wage and Price Stability Council.*
*World Hunger, Presidential Commission on.*

## EXPORT-IMPORT BANK

RULES
Freedom of information, 14438
Privacy Act; implementation, 57864

## FARM CREDIT ADMINISTRATION

RULES
Examinations, audits, and irregularities:
Technical name changes, 59472
Financing, eligibility and scope:
Equal housing lender poster, 59472
Federal land bank and production credit association loans, 16447, 36428
Funding and fiscal affairs:
Bank for cooperatives, 36052
Bonds; authority to issue and purchase eligibility requirement, 47488, 55239
Bonds; consolidated; in book-entry form, 7423
Loan policies and operations:
Banks for cooperatives; price support program commodities, 27782
Farm Credit System; technical changes, 7423
Organization and functions:
Bonds; authority to issue and purchase eligibility requirement, 47488
Personnel administration:
Nondiscrimination in employment; editorial changes, etc., 15622

PROPOSED RULES
Financing, eligibility and scope:
Federal land bank and production credit association loans, 6804
Funding and fiscal affairs:
Banks for cooperatives, 27849
Bonds; authority to issue and purchase eligibility requirement, 29010
Loan policies and operations:
Banks for cooperatives, participation loans, 60173
Organization of Farm Credit System; conflict-of-interest situations, 36108
Personnel administration:
Nepotism, 60173

NOTICES
Authority delegations:
Deputy Governor, Administration; order of succession, 36515
Deputy Governor, et al.; credit and operations, 6840
Governor; order of succession, 4676
Improving Government regulations, 21984, 50735, 54291, 54989
Regulatory agenda, semiannual, 50735, 54989

## FARMERS HOME ADMINISTRATION

RULES
Account servicing:
Debt settlement; increase of approval authority, 47488
Routine; reamortization, 21640
Routine; reporting dates, 8786
Appeals procedure, 52463
Applications; receiving and processing, removal of CFR Part, 56643
Association, community facility loans:
Grant funds use; definition of "rural" and "rural area," etc., 55236
Indian tribes and tribal corporations, 18161
Water and waste disposal systems, community domestic; development grants, 7200, 13494, 15136, 20221, 25331, 31125, 39747, 40200, 55237
Watershed loans in certain States; provisions removed, 22671
Authority delegations:
State Office staff employees et al., 7422
Civil rights compliance requirements, 7977, 58356
Development work, planning and performing:
Lead-based paints, prohibition, 31315
Nondiscrimination, 58356
Thermal performance standards, new and existing dwellings; construction standards, 3075, 7199
Drought stricken areas, special assistance; project completion dates, 20956
Emergency livestock:
Line of credit guarantees, 48619
Environmental statements; filing with EPA, 28440
Farm purchase and development loans (individual):
Land conservation and development; Appalachian Region discontinued, 20221
Grant assistance to State and local governments and nonprofit organizations; jointly funded, 26690
Guaranteed loan programs:
Business and industrial loan programs; eligibility criteria and application processing, 59828
Business and industrial loans; collateral, 7978
Business and industrial loans; expedited procedures for loan applications, 25801, 29933
Business and industrial loans; ineligible loan purposes, employment shifts, 38570
Business and industrial loans; information forms, 53413
Economic emergency loans, 35662, 55345
Emergency livestock loans, 28439, 49286
Farmer loans, emergency, 46291
Full faith and credit provisions, 55346
Loan note guarantee; inspection procedures, 1291
Rural housing program loans, 46506
Indian outreach program, 3697
Insurance:
Flood Insurance Program, National; servicing companies, 18538
Real property; name and location of borrowers, nondiscrimination on sexual basis, 56013
Real property; reporting requirements removed, 34430
Insured association and organization loans, bonds and notes for; CFR Part removed, 19342
Loan and grant making:
Disaster assistance, 36594
Economic emergency loans, 35648
Farm ownership, soil, water, and recreation; policies, procedures, and administration, 55895
Operating loans, farm ownership, soil, water, and recreation; policies, procedures, and administration, 55883

Loan and grant programs (group):
Associations; resource conservation and development loans and watershed loans and advances, 28442
Community facility loans;, water system metering devices, 52465
Community facility loans; cable television easements, 19342
Community facility loans; construction project sureties; interim rule, 37983
Community facility loans; water and waste disposal programs, 25800, 58363
Community facility loans; water and waste project construction; handling of remaining funds, 7201
Grant funds use; definition of "rural" and "rural area," etc., 55237
Self-help technical assistance grants, 2853, 11144
Loan and grant programs (individual):
Applications, processing and receiving, 56643
Approval and closing, chattel loans; removed, 55883
Chattel loans, closing, 7978
Construction and repair; compensation for construction defects, 59086
Construction and repair; suspension and debarment proceedings, 36886
Disaster assistance; replacement of form, 24265
Farmer program loans; deferral of loan installments, 17936
Farmer program loans; emergency, 46290
Farmer program loans; insured loans, 55882
Farmer program loans; refinancing requirement, 5503
Farmer program loans; repayment requirements, 5504
Organization and functions:
State advisory committees; advisory capacity to State directors, elimination, 23986
Personnel:
Rural development, utilization of gratuitous services; CFR part redesignation, 3694
Real estate and chattel properties:
Disposal of acquired property; inventory property sale report forms, etc., 3699
Disposal of acquired property; suitable property, 41373
Loans liquidation and property acquisition; editorial changes, 4418
Property management, 1290
Reporting requirements, semiannual labor compliance report, 8787
Reports; organization and functions, 59078
Rural development:
Area development assistance planning grants, comprehensive planning, 14283, 15137
Rural housing loans and grants:
Applications, processing and receiving, 56643
Communities eligible for assistance, 5503, 48619
Eligibility determinations, 45980
Handicapped; eligibility requirements extended to, 26562, 31002
Interest credit or subsidy recapture, 51385
Labor housing assistance definitions; inclusion of Puerto Rico and Virgin Islands, 3696
Loan funds to finance common areas, playgrounds and tot lots, 24264
Loans to FmHA employees, 55235
Low-income families, maximum adjusted income for; increase, 22671
Rental assistance agreements; apartment occupancy levels, 43017
Rental assistance program, 7968, 25790
Rental housing, construction lenders, 49527, 58080
Rental housing, construction lenders, interim, 32400
Rental housing loan policies, procedures and authorizations, 44826
Security for loans; elimination of personal liability requirement for limited partnership, 26278
State or local public agencies; temporary financing, 47487
Title clearance and loan closing; promissory notes, signatures, 7967

PROPOSED RULES
Appeals procedure, 21005
Applications; receiving and processing, 38707
Association, community facility loans:
Indian tribes and tribal corporations, 1098
Development work, planning and performing:
Thermal insulation standards; inquiry, 52496
Guaranteed loan programs:
Business and industrial loans; citizenship requirements, 28510, 34490
Rural housing program loans, 36952
Loan and grant programs (group):
Community facility loans; procurement, billing, etc., 54652
Community facility loans; water system metering devices, 29565, 31022, 32306
Flood plain management; policy and procedures, 41047
Wetlands protection; policy and procedures, 41059
Loan and grant programs (individual):
Construction and repair; compensation for construction defects, 46306
Rural development:
Area development assistance planning grants; comprehensive planning, 5488
Area development assistance planning grants; selection criteria, 58193
Rural housing loans and grants:
Eligibility standards; repayment ability determination, 14322, 34489
Loans to FmHA employees, 27195
Rental housing loan policies; congregate housing, 33923
Rural housing site loans, 41215

NOTICES
Business and industrial loans; insured loan interest rates, 8573, 22066
Disaster and emergency areas:
Alabama, 29972
Arizona, 21026, 28843
Arkansas, 1110, 13081, 13595, 28843
California, 4271, 8818
Colorado, 39596
Florida, 15343, 24081, 28843
Hawaii, 28843
Idaho, 36664
Illinois, 3922, 34827
Indiana, 1632
Iowa, 38063
Kansas, 3922, 38063, 38882
Kentucky, 2197, 22428, 24876, 26090
Louisiana, 3146, 3410, 6824, 6975, 10597, 10948, 18724
Maine, 6824
Massachusetts, 38063
Michigan, 14529, 18724, 39596
Minnesota, 3922
Mississippi, 2414, 6975, 7992, 14529, 31050
Missouri, 1632, 9760
Montana, 21026
Nebraska, 13081, 28844, 38063
New Jersey, 14529, 21706
New Mexico, 5555, 15343, 18724, 28844, 31050, 36988
New York, 3410, 15343
North Carolina, 2197, 3410, 8818, 15343, 20258
North Dakota, 14326
Oklahoma, 31050, 33276
Pennsylvania, 6115, 10948, 13595, 14326, 15344, 17512
South Carolina, 28844
South Dakota, 24876
Tennessee, 4271, 12897, 14530, 15344, 21706, 25157, 26090
Texas, 1632, 2415, 3411, 4271, 6976, 8818, 13082, 15344, 16206, 19897, 21706, 24081, 24876, 26090, 27218, 31051, 33276, 36121, 38064, 39596
Virginia, 1110
Improving Government regulations; inquiry, 21990
Loan and grant disbursement:
Funds allocations; 1979 FY, 50930
Mailing list for program regulations, establishment, 17988, 40542
Rural housing loans and grants:
Low income housing repair grants, distribution; inquiry, 17988

## FEDERAL AVIATION ADMINISTRATION

RULES
Air carriers certification and operations:
Agricultural aircraft operations; review program, 22643
Agricultural aircraft operations; special VFR night operations, 28178
Air ambulance service, airborne vibration motors, and in-flight overboard fluid leakage; withdrawn, 36461
Air carriers, scheduled, with helicopters; carriage of candidates in Federal elections, 44481
Air carriers, scheduled, with helicopters; operations review program, 22643
Air carriers, scheduled, with helicopters; operations review program; use of data for repairs, 3085
Air carriers with helicopters; regulatory review program, 46783, 49974
Air taxi and commercial operators of small aircarft; flight data and cockpit voice recorders, 28177
Air taxi and commercial operators of small aircraft; carriage of candidates in Federal elections, 44481
Air taxi and commercial operators of small aircraft; ground proximity warning system, 28176
Air taxi and commercial operators of small aircraft; operations review program; use of data for repairs, 3085
Air taxi and commercial operators of small aircraft; regulatory review program, 46783, 49974
Air travel clubs using large airplanes; ground proximity warning system, 28176

Air travel clubs using large airplanes; operations review program, 22642
Airframe and crashworthiness standards; airworthiness review program, 50602
Airworthiness review program, 2328, 3900
All-cargo air carriers, 1790
Certificate issuance procedures simplification, 58367
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; aircraft and airport security for charter flights, 24829
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; aviation security; carriage of weapons and armed escorts, 11975
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; carriage of candidates in Federal elections, 44481
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; flight data and cockpit voice recorders, 28177
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; ground proximity warning system, 28176
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; operations review program, 22641, 22646, 28403
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; operations review program; safety levels, 36464
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; operations review program; use of data for repairs, 3085
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; regulatory review program, 46782, 49974
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; x-ray devices for carry-on baggage inspection, 11977
Domestic, flag, and supplemental carriers and commercial operators of large aircraft; crewmember qualifications, operating experience, 9599
Federal elections, carriage of candidates, 43463
Foreign air carriers, operations; aircraft and airport security for charter flights, 24829
Foreign air carriers, operations; x-ray devices for carry-on baggage inspection, 11978
Rule-making procedures; authority delegations, 52205
Air traffic operating and flight rules:
Airworthiness review program, 2328, 3900
Carriage of candidates in Federal elections, 44481
Compliance dates and equipment, obsolete; removed, 7205
Emergency locator transmitter (ELT), operation of aircraft without; interim rule, 10905
In-flight overboard leakage and special certificates; withdrawn, 36461
Operations review program, 22640
Parachute jumping; operations review program, 22641
Registration eligibility; annual report requirements, 3901
SST noise and sonic boom requirements, 28421, 28420
Taxi clearances at airports with operating control towers, 11576
Transport category airplanes; pitot heat indication systems, 10339
VFR cruising altitude or flight level, 10904
Air traffic rules, special:
Sabre U.S. Army heliport, 7
Aircraft identification and registration marking; special certificates; withdrawn, 36461
Aircraft maintenance, preventive, etc.:
Operations review program, 22639
Special certificates; withdrawn, 36461
Aircraft products and parts, certification:
Airworthiness review program, 2316, 3900
Pilot status during flight tests and special certificates; withdrawn, 36461
SST noise and sonic boom requirements, 28419, 28421
Aircraft registration:
Eligibility, identification and activity, 3901
Airmen certification:
Airmen other than flight crewmembers; operations review program, 22640
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; operations review program; safety levels, 36464
Flight crew members other than pilots; operations review program, 22639
Pilots and flight instructors; operations review program, 22639
Special certificates; withdrawn, 36461
Airport security, 60792
Airports, National Capital; distribution of written or printed matter, 2720
Airworthiness directives:
Agusta, 52208
Aircraft Parts & Development Corp., 56016
AiResearch, 7424, 7979, 22339, 51611, 58806
AVCO Lycoming, 13370, 26281, 26282, 38371, 51001, 57241
Avions Marcel Dassault-Breguet, 949, 27510, 48623
Beech, 6060, 9594, 20786, 22933, 23702, 34766, 35472, 36430, 45982, 49975, 50413, 56106
Bell, 4845, 16698, 19205, 22340, 29554, 30535, 34767, 37681, 43293, 48624, 56647, 57241
Bendix, 19209, 28171, 39346
Boeing, 1294, 1295, 4420, 5507, 7204, 7425, 9593, 11569, 14959, 15414, 17937, 19645, 24273, 27511, 28171, 32404, 32405, 56017, 57864, 59474
Brackett Aircraft Specialties, Inc., 57865
British Aerospace, 25802, 26281
British Aircraft, 1297, 3544, 5506, 9590, 15411, 24825, 53416
Britten-Norman, 21870
Burkhart Grob, 26280, 27511
Callair, 43293
Canadair, 15410, 15412, 52208
Cessna, 1787, 11969, 13866, 14959, 18542, 20785, 22341, 22935, 25420, 25805, 27512, 29102, 34770, 41376, 49298, 58805, 60141
Champion, 19207
Consolidated Aeronautics, 29104
DeHavilland, 1295, 4420, 58802
Detroit Diesel Allison, 19206, 30534, 58802
Deutsch, 57865
Dowty Rotol, 16701, 32406
Fairchild Aircraft, 39346, 39347
Firestone, 45981
Gates Learjet, 30041, 35473, 57867
General Dynamics, 19211, 37680, 50416
General Electric, 13867, 14439, 21443, 59475
Glaser-Dirks, 27512
Goodyear, 9591, 14960, 28170
Grumman American, 7426, 15411, 16699, 27513, 30535, 52208, 58804
Gulfstream American Corp., 42733, 45343, 46523, 51002
Hartzell, 42732
Hawker Siddeley, 3080, 4421, 13371, 13868, 14439, 14958, 17346
Hiller, 39347, 49299, 50417, 52207, 52209
Hughes, 2720, 44475, 57871, 59476
Israel Aircraft Industries, 54082
Kawasaki, 1296
Let Blanik, 53416
Lockheed, 11570, 11571, 16151, 19210, 41016, 57242
Maule, 28172
McCauley, 1298, 10904, 16700, 24272, 42730
McDonnell Douglas, 5, 1299, 1300, 1301, 1302, 3079, 6760, 9136, 9587, 14440, 16152, 16702, 19207, 19208, 24826, 31126, 39348, 44477, 44478, 45983, 52210, 56018, 56019, 58804
Messerschmitt, 41375
Mitsubishi, 2168, 5505
Mooney, 29103, 33234, 36429
Piper, 4, 2168, 3079, 9135, 13372, 15409, 15413, 16700, 17344, 21441, 22342, 25805, 26697, 28170, 32406, 35471, 39748, 48624, 49976, 50418, 51002, 51003, 52211, 52212, 58807, 60139, 60140, 60141
Pratt & Whitney, 14441, 17345, 21442, 22932, 25804, 34767, 36431, 38372, 38373, 46961
Pyrotector, Inc., 30040
Rockwell International, 19209
Rolladen Schneider, 51004
Rolls Royce, 13869, 34769, 39750, 41374, 52213
Schweizer, 26697
Scottish Aviation, 24826
Short Brothers, 950, 13372, 20786, 21870, 21871, 24827, 25803, 26280, 49977
Sikorsky, 7980, 11970, 25803, 44476, 44478, 49976
Societe Nationale Industrielle Aerospatiale, 6761, 48626, 51004, 52213
Sundstrand Data Control, Inc., 951
Swearingen, 53417
Taylorcraft Corp., 46524
Ted Smith Aerostar, 5507
Teledyne Continental Motors, 10340, 16152, 17345
Airworthiness standards:
Airframe and crashworthiness standards; airworthiness review program, 50592, 52495, 54082
Airworthiness review program, 2317, 2320, 2324, 2326, 3900
In-flight overboard leakage; withdrawn, 36461
Transport category airplanes; fatigue regulatory review program, 46242

Transport category airplanes; pitot heat indication systems, 10339
Area high routes, 730, 3546, 17347, 18551, 19212, 30044, 30537, 45345, 51012
Area low routes, 647
Aviation maintenance technician schools:
Operations review program, 22643
Control areas, 347, 3902, 8507, 10340, 12675, 15416, 17938, 21449, 31127, 39751, 40213, 41381, 43294, 46525, 50418, 51006, 57243, 60431
Control zones, 6, 355, 952, 1787, 3081, 3082, 3546, 3552, 4848, 4849, 5509, 6762, 8508, 9137, 9594, 11971, 13373, 13375, 14443, 15415, 17939, 18550, 18551, 19645, 21444, 21445, 21873, 22935, 24275, 25805, 26283, 27516, 29555, 31127, 33235, 34114, 36432, 36894, 36895, 37681, 39752, 39753, 41381, 42734, 43294, 46526, 46961, 47490, 48627, 49300, 49978, 51006, 51007, 51612, 53418, 56020, 58808, 58809, 60144, 60145, 60430
Definitions; airworthiness review program, 2316, 3900
Enforcement procedures:
Hazardous materials; transportation or shipment by air, 10334
Federal airways; green, amber, red, blue, 305, 51612
IFR altitudes, 1305, 8509, 16704, 25808, 34773, 45987, 56022
Jet routes, 714, 3083, 3546, 3554, 15416, 17369, 17940, 19212, 21451, 23704, 30044, 30537, 31128, 32408, 36896, 38815, 39754, 39755, 43295, 51012, 56021, 59478
Noise standards:
Measurement and evaluation specifications, 8739
SST noise and sonic boom requirements, 28419, 28421
Subsonic transport and turbojet airplanes; noise level limits and acoustical change requirements, 8730, 44475, 47489
Operating and flight rules:
Federal elections, carriage of candidates, 43463
Operations review program; use of data for repairs, 3085
Procedural rules:
Authority delegations to Chief Counsel et al.; general rule-making procedures, 52205
Prohibited areas, 712, 11575
Repair stations:
Operations review program, 22643
Operations review program; use of data for repairs, 3085
Reporting points, 631, 3546, 15416, 30042, 36431
Restricted areas, 344, 659, 3084, 3549, 3554, 6762, 6763, 9139, 9596, 11574, 16703, 21450, 22936, 23703, 28812, 28814, 30043, 30536, 31128, 36896, 38378, 38815, 40214, 40215, 42734, 46962, 50421, 51010, 51011, 52214, 52467, 56648, 60431
Standard instrument approach procedures, 1788, 3555, 5511, 7982, 9597, 11973, 14444, 16711, 19214, 21452, 24276, 25810, 28175, 30044, 32490, 35475, 37684, 41020, 42735, 46527, 49302, 51613, 53420, 56029, 58812
Technical standard order authorizations:
Cargo pallets, nets, and containers, 59473
Transition areas, 5, 6, 440, 951, 952, 953, 954, 1303, 1304, 3080, 3081, 3082, 3547, 3551, 3552, 3553, 4422, 4423, 4847, 4848, 5508, 5509, 5510, 6761, 7205, 7981, 9137, 9138, 9595, 11571, 11572, 11573, 11971, 11972, 13373, 13374, 13869, 14442, 14443, 14961, 15414, 15415, 15416, 17347, 17939, 17940, 18550, 19212, 19213, 19646, 19647, 20225, 20787, 20788, 20789, 21448, 21872, 22342, 23703, 24274, 25806, 25807, 26283, 26698, 27516, 28173, 28174, 28810, 28811, 29104, 29556, 30041, 30536, 31884, 32407, 33235, 33236, 34114, 34115, 34771, 34772, 35474, 36432, 36894, 36895, 36896, 37682, 37683, 38374, 38375, 38376, 38377, 38378, 38814, 39349, 39751, 39752, 40212, 41018, 41019, 41382, 41383, 43294, 44479, 44480, 45343, 45344, 45984, 45985, 46524, 46525, 48627, 49300, 49301, 49977, 50418, 50419, 50420, 50421, 51007, 51008, 51009, 53419, 54925, 56020, 56021, 58807, 58808, 58809, 58810, 59477, 60142, 60143, 60144, 60430
VOR Federal airways, 307, 3083, 3544, 3545, 3546, 3548, 3549, 3553, 3554, 4422, 5510, 7204, 7980, 11971, 11972, 16153, 19212, 21444, 21446, 21447, 29554, 29555, 30042, 31128, 39754, 40212, 44480, 51005, 51010, 56021, 58811, 59477, 60431

**PROPOSED RULES**

Air carriers certification and operations:
Air carriers, scheduled, with helicopters; operations review program, 20448, 35518
Air travel clubs using large airplanes; flight crewmember flight and duty time limitations and rest requirements, 8070, 22650
Airport security, 9160
Crewmember qualifications; operating experience, 4438
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; aircraft cabin ozone contamination, 46034
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; compensation for required security measures in foreign air transportation; meeting and extension of time, 10938
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; flight crewmember flight and duty time limitations and rest requirements, 8070, 22650
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; fuel system explosion prevention, interior materials, etc.; withdrawn, 37703
Domestic, flag, and supplemental air carriers and commercial operators of large aircraft; operations review program, 20448, 35518, 46230
Domestic, flag, supplemental, commercial, and foreign air carriers; aircraft and airport security, 9160, 13891
Land airports serving CAB-certificated air carriers; listing of safety equipment in operation manuals; withdrawn, 3920
Multi-engined small airplanes, reciprocating and turbopropellar powered; increase in approved takeoff weights and passenger seating capacities, 46734
Operations review program, 37958
Air traffic operating and flight rules:
Operations review program, 46230
SST noise and sonic boom requirements; hearing and extension of time, 4868, 5522
Air traffic rules, special:
Chicago Midway Control Zone, VFR weather minimums; withdrawal, 17370
Portland International Airport traffic area; Pearson Airpark operations, 44549
Aircraft products and parts, certification:
Parts manufacturer and export airworthiness approvals, etc.; extension of time, 15432
SST noise and sonic boom requirements; hearing and extension of time, 4868, 5522
Aircraft registration:
Fees revision, 16924
Identification numbers for civil aircraft, 54101
Aircraft titles and security documents, recording:
Fees revision, 16924
Airmen certification:
Aircraft registration and recording conveyances; fees revision, 16924
Airmen medical standards:
Aircraft registration and recording conveyances; fees revision, 16924
Airport security; domestic, flag, supplemental, commercial and foreign air carriers, 9160, 13891
Airspace, navigable, objects affecting, 26322, 49991
Airworthiness directives:
Agusta, 24849, 24850, 25830, 25831, 27555, 34786
Airbus Industrie, 20818
AiResearch, 38414
Avions Marcel Dassault-Breguet, 24849
Beech, 9617, 12026
Bell, 7443, 13890, 14970, 31940, 45375
Boeing, 1352, 3130, 3918, 16191, 17364, 19666, 29585, 42766, 43312
British Aircraft, 13, 1352, 1353, 15433
Canadair, 60174
Cessna, 1354, 6805, 13390, 25831, 31941
Curtiss Wright, 54100
Dornier, 27556
Fokker, 45376
Gates Learjet, 40233
Grumman American, 13391, 25833
Hawker Siddeley, 974, 3131, 3132
Hiller, 24848, 32432
Israel Aircraft Industries, 10410
Lockheed, 17366
McCauley, 23727
McDonnell Douglas, 13, 3131, 6807, 20237, 25832, 29583, 29584, 45380, 46037
Messerschmitt-Bolkow-Blohm, 16740
Mooney, 12025
Pratt & Whitney, 1355, 1801, 2733, 7988, 14517, 21463, 22374
Pyrotector, Inc., 9156
Rolls Royce, 975, 27557
Short Brothers, 27558, 49989, 50444
Sikorsky, 32432
Societe Nationale Industrielle Aerospatiale, 24847, 26318, 34787
Swearingen Aviation, 31939
Taylorcraft Aviation Corp., 59515
Teledyne, 54100
Airworthiness standards:
Light transport airplane airworthiness review, 60846

Multiengine small airplanes, reciprocating and turbopropeller powered; increase in approved takeoff weights and passenger seating capacities, 46734, 48653
Operations review program, 37958, 46230
Transport category airplanes; aircraft cabin ozone contamination, 46034
Transport category airplanes; Douglas DC-3 airplanes with turboprop engines, 21900
Transport category airplanes; fuel system explosion prevention, interior materials, etc.; withdrawn, 37703
Wheels and wheel-brake assemblies, 57261
Area high routes, 1802, 6807, 15437, 31163
Control areas, 9157, 26321, 31943, 45381, 49312, 52496
Control zones, 1802, 4868, 4869, 6807, 11587, 12026, 20819, 20820, 24851, 28207, 29131, 30068, 30571, 30572, 31943, 33257, 37709, 37711, 38415, 40237, 41408, 44548, 51026, 53446
Definitions:
Airworthiness standards; multiengine small airplanes, reciprocating and turbopropellar powered; increase in approved takeoff weights and passenger seating capacities, 46734
Federal airways; green, amber, red, blue, 39803
Fees:
Aircraft registration and recording conveyances; fees revision, 16924
Foreign air carriers:
Aircraft security, 9160
Instruction, ground; aircraft registration and recording conveyances; fees revision, 16924
Jet routes, 9157, 10938, 20240, 24856, 31162, 32438, 34158, 35946, 36471, 50445, 51030
Noise standards:
SST noise and sonic boom requirements; hearing and extension of time, 4868, 5522
Operating and flight rules:
Identification numbers for civil aircraft, 54101
Procedural regulations:
Petitions for rule making and exemptions; publication in Federal Register, 31936
Reporting points, 9157, 28817
Restricted areas, 2183, 2734, 3919, 12028, 16741, 16744, 17368, 19238, 20239, 24854, 24855, 25837, 26323, 35945, 39803, 39804, 49990, 52496, 56680, 60579
Standard instrument approach procedures; aircraft approach categories, 1803
Technical standard order authorizations:
Cargo pallets, nets, and containers; minimum performance standards, 9155
Transition areas, 1802, 2183, 3133, 3134, 3918, 4437, 5524, 6095, 7245, 7444, 7988, 9157, 9617, 9618, 9619, 9620, 9621, 9622, 11587, 12027, 12721, 13393, 13891, 14518, 15434, 15435, 15436, 15437, 16742, 16743, 17966, 19235, 19236, 19237, 20238, 21464, 22375, 22376, 22377, 22985, 22986, 22987, 24324, 24851, 24852, 24853, 24854, 25834, 25835, 25836, 26319, 26320, 26755, 26756, 27559, 28208, 28209, 30068, 30571, 30573, 31160, 31162, 31942, 31943, 32433, 32434, 32435, 33257, 34157, 36972, 36973, 37705, 37706, 37707, 37708, 37709, 37710, 37711, 38415, 38416, 40237, 41051, 41409, 42766, 45381, 45382, 46038, 46549, 46978, 46979, 48653, 49310, 49311, 49312, 49989, 51026, 51027, 53446, 53447, 53448, 53449, 56052, 56053, 56678, 56680, 58826, 58827, 58828, 60175, 60577, 60579
VOR Federal airways, 5523, 7244, 7444, 11585, 11586, 14971, 14972, 16192, 16742, 17367, 28817, 32436, 32437, 32438, 35944, 36471, 49313, 49314, 54943, 56051, 56679, 58829, 58830, 60578

**NOTICES**

Active Beacon Collision Avoidance System (BCAS); proposed National Aviation Stnadard; inquiry, 59565
Advisory circular checklist and status of FAA regulations, 2330, 19773
Airport and airway development legislation, post-1980; consultative planning conference, 19310
Airport and airway system; reduction of nonessential federal expenditures; users inquiry, 46105
Airport properties; retrocession of concurrent jurisdiction over Metro easement at Washington National Airport, 4892
Airports; Metropolitan Washington; proposed policy, 12141, 26353
Airspace, navigable, objects affecting:
Hotel, proposed; Atlantic City, N.J., 16835, 20289, 30155
Committees; establishment, renewals, terminations, etc.:
Aeronautics Radio Technical Commission, 5605
Special Aviation Fire and Explosion Reduction Advisory Committee, 24929
Technical Advisory Committee, 17437
Concorde, operation between Dallas and Europe; interchange arrangements, 57367
Discrete Address Beacon System (DABS); proposed National Aviation Standard; inquiry, 12816, 24930
Enforcement procedures:
Hazardous materials shipment, selection of hearing officers; inquiry, 10456
Engineering and development initiatives-policy and technological choices; consultative planning conference and progress report, 7494, 30155
Meetings:
Aeronautics Radio Technical Commission, 1418, 7494, 8049, 10456, 10999, 11637, 16836, 19747, 20883, 21962, 23068, 24930, 26811, 28282, 29205, 30155, 32007, 32487, 33358, 34858, 37787, 38656, 38965, 39881, 41449, 45486, 46617, 49387, 53522, 54153, 60246, 60247
Air Traffic Procedures Advisory Committee, 8049, 13937, 28282, 46105
Airport and airway development legislation, post-1980; consultative planning conference, 19310
Engineering and development initiatives-policy and technological choices; progress report, 30155
Engineering and development initiatives-policy and technology choices, 7494
High Altitude Pollution Program Scientific Advisory Committee, 51734
Wake Vortex Alleviation and Avoidance, FAA/NASA Workshop, 49387
Organization and functions:
Air Carrier District Office, Dallas and Fort Worth, Tex.; consolidation, 57995
Air Carrier District Office, San Diego, Calif.; closed, 3962
Air Carrier District Office, Ypsilanti, Mich.; address change, 20883
Air Traffic Control Tower, Martha's Vineyard, Mass.; commissioning, 20882
Aircraft engineering activities in Nevada; areas of responsibility change, 9211
Archorage Flight Service Station/ International Flight Service Station, 44581
Combined station/tower, Battle Creek Mich.; decombining, 3189
Control Tower, Martha's Vineyard, Mass.; decommissioning, 46617
Control tower, Molokai, Hawaii; opening, 30155
Control tower, Montoursville, Pa.; reduction of hours; cancellation, 3189
Control tower, Newport News, Va.; reduction of hours, 50529
Control tower, Pueblo, Colo.; reduction of hours, 25894
Flight standards district office, Memphis, Tenn.; redesignation, 12141
General Aviation District Offices; Jacksonville, St. Petersburg, and Miami, Fla.; boundary changes, 38965
Wake Vortex Alleviation and Avoidance, FAA/NASA workshop, 49387

## FEDERAL BUREAU OF INVESTIGATION

**NOTICES**

Meetings:
National Crime Information Center Advisory Policy Board, 12131, 15018, 43396
National Crime Information Center; Criminalistic Laboratory Information System (CLIS); establishment, 23022
National Crime Information Center Advisory Policy Board; annual review; inquiry, 9207

## FEDERAL COMMUNICATIONS COMMISSION

**RULES**

Amateur radio service:
Alien permit applications, 21886
Frequencies available for use by general class amateur radio operators, 19854
Licensing and call sign assignment systems; simplification, 7323, 15325
Licensing and operating of complex systems of stations and modification of repeater subbands, 15327
Novice class operators; licensing; editorial change, 17359
Operation in Tex. and N. Mex.; 220--225 MHz band, 14663
Operator classes, privileges, and requirements; technician class, 15324
Operator examinations; administration, 25122
Repeater, auxiliary link, control or remotely controlled station; FCC approval rules waived, 7320
Type acceptance of equipment requirement, 12688, 33725
Aviation services:
Aeronautical advisory station license applications, 56899

Aeronautical advisory station license applications; written notice, 1505
Applications filed by corporations, permitting corporate officers or authorized employees to sign, 27991, 32778
Editorial amendments; deletion of obsolete effective dates, 41986
Emergency frequencies; monitoring of emergency locator transmitter signals, 42285
Frequencies, certain; use for ships and aircraft, 41986
License renewal applications, 20803
Radio Frequency Management Coordinator for the Table Mountain (Colorado) Radio Receiving Zone; address change, 52246
Radionavigation land test stations; non-type accepted equipment; editorial change, 29562
Service commencement notification of new public coast, aeronautical advisory, and radionavigation land stations, 60276
Station identification, use of FAA indentifier, 41214
Cable television relay services (SEE ALSO Radio broadcast services):
FM microwave and direct video and audio feed modulation in television translator stations, 1952
Microwave stations; continuous operation, 25127
Mobile stations; unattended operation; requirements, 4616
Cable television (SEE ALSO Radio broadcast services):
Candidates for public office; equal opportunity and access; definition of legally qualified, 32796
Certification procedure replaced by registration, 49008
Financial report, annual, 51791
Network program exclusivity protection, 16339, 22212, 25123, 26022, 38391
Nondiscrimination in employment policies and practices, 53753
Radio Frequency Management Coordinator for the Table Mountain (Colorado) Radio Receiving Zone; address change, 52246
Signal strength contours; use modification and elimination, 36946
Systems: definition and creation of classes of system, 20235
Citizens radio service. SEE Personal radio services.
Domestic public radio services:
Applications, mutually exclusive; editorial change, 1498
Land mobile channels in 13 largest urbanized U.S. areas, 49800, 52246, 59383
Land mobile services, licenses, 35346
Radio Frequency Management Coordinator for the Table Mountain (Colorado) Radio Receiving Zone; address change, 52245
Radiotelephony for tone signaling; editorial amendment, 8140
Educational FM broadcast stations (SEE ALSO Radio broadcast services):
Class D, 39715, 47975
Experimental broadcast services:
Broadcasting regulation; editorial changes, etc., 14661, 41401
Educational FM stations, class D, 39715, 47975
Environmental Research Laboratories, Commerce Department; address change, 51790
FM broadcast translator stations; operation termination, 14660
Remote pickup broadcast stations; compliance with authorized bandwidth, etc.; extension of compliance date, 38390
Television translator relay stations; FM microwave and direct video and audio feed modulation, 1949
Type accepted equipment, use, 13576
Experimental nonbroadcast radio services:
Equipment demonstration license; eligibility statement, 16736
FM broadcast stations; table of assignments (SEE ALSO Radio broadcast services):
Alabama, 1500, 1502, 4615
Alaska, 27536, 58091
Arizona, 56236
Arkansas, 5515, 20499, 36104, 59070
California, 8805, 49003, 59069, 59383
Colorado, 4613
Florida, 1501, 2880, 30801
Georgia, 4612, 10343, 21885, 26022, 27536, 53742
Idaho, 24534
Illinois, 21678, 32302
Indiana, 2880
Iowa, 39584
Kansas, 14965
Kentucky, 27535, 54098
Louisiana, 15322, 58091
Maine, 14966
Maryland, 4616, 30540
Michigan, 39388
Minnesota, 32301
Mississippi, 1502
Missouri, 4615, 36104
Montana, 20498, 20989
Nebraska, 4614, 35924
Nevada, 36945
New Jersey, 36946
New Mexico, 25345
New York, 10344, 14966
North Carolina, 1499, 20498, 30540
Ohio, 27537
Oklahoma, 26022
Oregon, 59069
Pennsylvania, 14658, 27537, 60161
South Carolina, 3363
Texas, 5000
Vermont, 27538
Virginia, 6606, 27538, 36942
Washington, 9280, 11705, 14965
Wisconsin, 27540, 36945
Frequency allocations and radio treaty matters:
Editorial changes, 41985
External radio frequency power amplifiers; amateur radio service, 33725
Port operations frequency in CG designated vessel traffic services radio protection areas; correction, 2879
Radio frequency bands, design of; minimization of interference to radio astronomy operations, 25344
Travelers Information Station; operation in frequency range 530, 606, and 1612 kHz; correction, 10697
Type acceptance of equipment requirement and external radio frequency power amplifiers; amateur radio service, 12687
Industrial radio services:
Applications filed by corporations, permitting corporate officers or authorized employees to sign, 27992, 32772
Business radio service, frequency assignment, Dallas, Tex., 8518
Business radio service, frequency assignment; Dallas/Fort Worth, Tex., 55769
Digital transmission systems; modifying low pass audio filtering requirements, 6784
Frequencies, standards and procedures for on-board communications, 4261
Frequencies allocated for use by operators of central station commercial protection facilities, 51019, 53040
Land mobile radio systems, private; interconnection with public, switched, telephone network, 38407
Morse code identification equipment, automatic; permission to use in land mobile radio services, 7434
Pulsed carrier emissions, 10368, 30057
"Splinter" and "offset" channels for remote control and telemetry operations; correction, 11822
Taxicab radio service channels (450 MHz band); interservice geographic sharing, 11994, 13577, 29007
Transfer of regulations to land mobile radio services, 54898
International fixed public radiocommunication services:
Radio Frequency Coordinator for the Table Mountain (Colorado) Radio Receiving zone; address, 52245
Land mobile radio services, private:
Consolidation and transfer of regulations, 54791
Land transportation radio services:
Applications filed by corporations, permitting corporate officers or authorized employees to sign, 27992, 32778
Digital transmission systems; modifying low pass audio filtering requirements, 6785
Land mobile radio systems, private; interconnection with public, switched, telephone network, 38407
Morse code identification equipment, automatic; permission to use in land mobile radio services, 7435
Taxicab radio service channels (450 MHz band); interservice geographic sharing, 11994, 13577, 29007
Transfer of regulations to land mobile radio services, 54898
Maritime services, land and shipboard stations:
Aircraft use of maritime mobile VHF frequencies, 32799
Alaska; service commencement notification of new public coast, aeronautical advisory, and radionavigation land stations, 60276
Alaska public fixed stations; service charges, 32303
Applications filed by corporations, permitting corporate officers or authorized employees to sign, 27991, 32778
Automatic alarm receivers; compliance date extension, 52492

Call signs assignment in maritime mobile service, 13062
Canada-U.S. channeling agreements, 5378
Editorial amendments, 30541
Emission classes, 17473
Frequencies, standards and procedures for on-board communications, 4261
Lights, electric; ten watt minimum, deletion, 15324
Limited coast II-B stations; medium and high frequencies, 8143
Pilot communications; frequency 156.875 MHz available for exclusive use, 45365
Port operations frequency in CG designated vessel traffic services radio protection areas; correction, 2879
Radiocommunications transmission; prohibitions for vessels on land, 6092
Radiotelegraph stations, public coast; closure, 10344
Radiotelegraph stations, public coast; table amended, 52246
Radiotelephone connection bridge-to-bridge; reserve energy, 20010
Radiotelephone frequencies, temporary assignment of new HF for mobile services; correction, 2395
Radiotelephony; assignment of frequencies; editorial changes, 29295
Radiotelephony; frequencies between 4000-27500 kHz; restrictions, 19853
Radiotelephony usage; frequency changes, 1624, 3563
Search and rescue frequencies; editorial amendments, 56236
Ship radio telegraph stations; assignment of frequencies; editorial changes, 22042
Transmitter power; increase, 18679
VHF capabilities, mandatory; SSB equipped vessels in Alaska waters, exemption, 51791
Microwave radio service, private operational, fixed:
Applications filed by corporations, permitting corporate officers or authorized employees to sign, 27992, 32778
Interference protection criteria and frequencies, 1625
Organization and functions:
Amateur code credit certificates, 25122
Cable Television Bureau, Chief; authority delegations, 49008, 52243
Chief Administrative Law Judge; consolidation of related proceedings; authorization, 49307
Common Carrier Bureau, Chief; cable television pole attachment complaints, 36094
Contracting Officer, appeals from decisions of; use of GSA Board of Contract Appeals, 24310
Field Operation Bureau, field installation locations, 55764
General Counsel Office, 29006
Network Inquiry Special Staff, establishment, 36444
Public Information Office; title change, 8140
Staff; delegation of forfeiture authority, 52244, 54096
Personal radio services:
Applications filed by corporations, permitting corporate officers or authorized employees to sign, 27992, 32778
Citizens band radio service (CB); simplification of regulations, 13978
Land mobile radio systems, private; interconnection with public, switched, telephone network, 38407
Morse code identification equipment, automatic; permission to use in land mobile radio services, 7435, 13880
Practice and procedure:
Amateur code credit certificates, 25122
Applications filed by corporations, permitting corporate officers or authorized employees to sign, 27991, 32778
Cable television; pole attachment complaint procedures, 36094
Construction permits, applications for extension of time; combination of application forms, 60927
Ex parte communications in contested cable television proceedings, and target dates for rulemaking actions, 29561
FM noncommercial educational stations applications; changes in processing, 25822
Forfeiture procedures, 49308
Licensing and call sign assignment systems; simplification, 7323
Radio and TV broadcasting; reregulation, 45844, 47507, 53735, 54096
Service commencement notification of new public coast, aeronautical advisory, and radionavigation land stations, 60276
Speakerphones, use in proceedings, 33251
Waivers, request for; editorial change, 10343
Private land mobile radio services:
Applications, simplification of filing requirements, 59070
Public safety radio services:
Applications filed by corporations, permitting corporate officers or authorized employees to sign, 27992, 32778
Digital transmission systems; modifying low pass audio filtering requirements, 6784
Emergency radio service; special one-way paging operations, 5833, 7432
Land mobile radio systems, private; interconnection with public, switched, telephone network, 38403, 41988
Local government services, travelers information stations; frequencies 530, 1606, and 1612 kHz, 25129, 30057
Morse code identification equipment, automatic; permission to use in land mobile radio services, 7434
"Splinter" and "offset" channels for remote control and telemetry operations; correction, 11822
Transfer of regulations to land mobile radio services, 54791
Travelers Information Station; operation in frequency range 530, 606, and 1612 kHz; correction, 10697
Radio broadcast services (SEE ALSO Cable television; Educational FM stations; FM stations; Television broadcast stations):
Candidates for public office; equal opportunity and access; definition of legally qualified, 32795
Environmental Research Laboratories, Commerce Department; address change, 51790
Reregulation of television and radio broadcasting, 4022, 8141, 8142, 14659, 32778, 45844, 47507, 50683
Radio frequency devices:
CB receiver certification program; technical specifications, 25122
UHF television receiver noise figure reduction, 36103, 54097
Walkie-talkies, low powered; marketing cut-off date extension, 14654
Satellite communications:
Radio Frequency Management Coordinator for the Table Mountain (Colorado) Radio Receiving Zone; address change, 52245
Telephone and telegraph companies:
Employee compensation, reporting requirements; annual report form M, 16738
Telephone companies:
Accounts, uniform system; ratemaking, plant and expense items, etc., 21333
CATV channel facilities, construction and operation; application procedures, 3563
Telegraph speed of service studies, domestic, 11704
Telephone companies; extension of lines and discontinuance of service:
Spanish International Network; authorized user status request, 56235
Telephone network, connection of terminal equipment:
Message toll and wide area telephone service; interstate and foreign; classes, 16499
Television broadcast stations; table of assignments (SEE ALSO Radio broadcast services):
Alabama, 24534, 46972
California, 30803
Delaware, 38390
Georgia, 24535
Hawaii, 6607
Illinois, 7208, 27539
Iowa, 57604
Minnesota, 57604
Missouri, 1503
New Mexico, 41401
Oregon, 1503
Texas, 1504, 3364
Wisconsin, 6605, 27539
Television broadcast stations (SEE ALSO Radio broadcast services):
Prime-time access rule, effect of TV market rank changes; temporary waiver request, 7427
Subscription television; sports events programming restriction repeal, etc., 15324, 53742

**PROPOSED RULES**

Amateur radio service:
Alaska, common emergency frequency for use by single sideband high frequency stations; terminated, 35352
Emissions authorized; American National Standard Code for Information Interchange (ASCII), 36984
Emissions authorized; maximum authorized bandwidth table substitution; withdrawn, 36985
Extra class licensees; call signs; terminated, 51656

Handicapped operator license applicants; telegraphy examinations, 37729, 56251
Licensing and call sign assignment systems; simplification, 7332
Radio astronomy operations; procedures to minimize potential interference, 51048
Aviation services:
Aeronautical advisory frequencies, use by aeronautical utility mobile stations, 47220
Aeronautical advisory frequencies; use by ground vehicles at landing areas without control tower or flight service station, 46871, 49017, 49331
Aeronautical advisory station, additional authorized to separate helicopter and fixed-wing aircraft communications, 3408
Alaska, common emergency frequency for use by single sideband high frequency stations; terminated, 35352
Emergency frequencies; monitoring of emergency locator transmitter signals; inquiry; extension of time, 7990
Frequencies, certain; use at nontower airports, 25150
Joint Tactical Information Distribution System; establishment in 960-1215 MHz band, 35350, 51649
Radionavigation services, aeronautical and maritime, 36489
Stations, operation requirements; notification of commencement, 19690
Cable television relay services (SEE ALSO Radio broadcast services):
Band expansion, 12.7-12.95 to 12.7-13.20 GHz; inquiry, 9500, 23616
Continuous operation, 7334
Cable television (SEE ALSO Radio broadcast services):
Candidates for public office; equal opportunity and access; definition of legally qualified, 13402
Certificate of compliance process; registration, 30845
Multiple ownership of AM, FM and television stations and CATV systems, 36978, 47222
Network non-duplication rules, 48667
Radio signals importation; withdrawal, 5012
Saturated systems; regulatory relief from mandatory signal carriage requirements; extension of time, 3598, 8275, 15342
Citizens radio service. SEE Personal radio services.
Domestic public radio services:
Permission to use "offset" channels in 150 MHz band, 28007, 35969, 46983
Educational FM broadcast stations (SEE ALSO Radio broadcast services):
Assignment practices, classes, and table of assignments, 27682
Noncommercial; promotional announcements, auctions, fund-raising marathons, and underwriting credits, 31166, 36116, 60968
Experimental broadcast services:
CARS band expansion; inquiry, 9500, 23616
FM translator stations, 14695, 19695, 23619, 30080
Low-power television broadcasting and television translators in National telecommunications system; inquiry, 38436, 58100
Solicitations for contributions by VHF-TV translator stations, and emergency messages by TV and FM translators, 36981
FM broadcast stations; table of assignments (SEE ALSO Radio broadcast services):
Alabama, 26082
Alaska, 6112, 18574, 34170
Arizona, 8815
Arkansas, 1513, 1515, 11724, 19692, 27570, 32832, 36659, 47985, 58099
California, 6111, 9510, 17979, 20247, 20249, 23617, 24862, 30079, 31165
Colorado, 46876
Florida, 1510, 6633, 19896, 38607
Georgia, 10710, 19241, 46872
Idaho, 4076, 7329, 16355, 19896
Illinois, 6635, 15341, 27572, 37723
Iowa, 19895, 40887
Kansas, 1512
Kentucky, 1515, 11724, 11835, 19691, 47985
Louisiana, 27571, 54109, 54110
Maryland, 3403
Michigan, 16203, 19240, 29152, 32834, 47577, 49552, 60310
Minnesota, 14977, 29017, 40887, 53475, 58205
Missouri, 29592, 46871
Montana, 3405
Nebraska, 14088
Nevada, 16354, 31165
New Hampshire et al., 51654
New Jersey, 17981, 25698, 35969, 40888
New Mexico, 3407
New York, 1514, 37724, 51655, 59405
North Carolina, 28011, 33772, 45620, 59113
Ohio, 8273, 27569
Oklahoma, 8816, 34509, 47986, 60308, 60969
Oregon, 30079
Pennsylvania, 9511, 38735
Tennessee, 11724, 47985, 60309
Texas, 1511, 34509, 38058, 47576, 47986, 54111
Vermont, 10943, 12346, 24334
Virginia, 3403, 10413, 38060, 49552, 55428, 60970
Washington, 29018
West Virginia, 37722
Wisconsin, 8274, 10944, 21701, 29152, 46873
Frequency allocations and radio treaty matters:
Aeronautical advisory frequencies, use by aeronautical utility mobile stations, 47220
Aeronautical advisory frequencies; use by ground vehicles at landing areas without control tower or flight service station, 46871, 49017, 49331
Alaska, common emergency frequency for use by single sideband high frequency stations; terminated, 35352
CARS band expansion; inquiry, 9500, 23616
Emergency position indicating radio beacons, use for vessels operating in coastal waters, 35353, 60307
Joint Tactical Information Distribution System; establishment in 960-1215 MHz band, 35350, 51649
New Orleans Vessel Traffic Services area; frequencies available for port operations, 59110
Radionavigation services, aeronautical and maritime, 36489
Industrial, scientific, and medical equipment, 46326
Industrial radio services:
Alaska, common emergency frequency for use by single sideband high frequency stations; terminated, 35352
Business radio service frequencies; prohibition of radio operations by non-central station electrical protection entities, etc., 6272
Digital transmission systems; modifying low pass audio filtering requirements; extension of time, 6822
Directional antennas at stations located at high elevations in southern California; inquiry, 35360
Oil transfer operations, permissible communications to aid pollution prevention, 47578
Taxicab radio service channels (450 MHz band); interservice geographic sharing, 12048
Land transportation radio services:
Alaska, common emergency frequency for use by single sideband high frequency stations; terminated, 35352
Digital transmission systems; modifying low pass audio filtering requirements; extension of time, 6822
Taxicab radio service channels (450 MHz band); interservice geographic sharing, 12048
Maritime services; land and shipboard stations:
Alaska, common emergency frequency for use by single sideband high frequency stations; terminated, 35352
Coast station licensees; authorization to use ship station frequencies; terminated, 11836
Directional antennas at stations located at high elevations in southern California; inquiry, 35360
Emergency position indicating radiobeacons, use for vessels operating in coastal waters, 35353, 60307
Great Lakes safety; U.S. and Canadian agreements; technical radio requirements for vessels, 43476
Mississippi River System; bridge-to-bridge communications frequencies, 45901
New Orleans Vessel Traffic Services area; frequencies available for port operations, 59110
Oil transfer operations, permissible communications to aid pollution prevention, 47578
Pilot communications; frequency 156.875 MHz available for exclusive use, 24863
Public coast station applicants; financial qualifications, 20026
Radiotelegraph services, interconnection and upgrading of public coast facilities, 10414, 16355, 21701, 28215
Radiotelegraph stations, ship; communication with amateur stations, 20249
Radiotelephone frequencies, single sideband emission A3J on 2182 kHz, 32835
Scanning type receivers; provision for use on vessels fitted with VHF installations, 40889
Stations, operation requirements; notification of commencement, 19690
Telegraphy by limited coast stations; removal, 51047
Vessels equipped with telegraph; range requirement, 28840

VHF transmitters, remote control units, 35512
Monitoring stations, protection from radio interference, 54106
Motor vehicle ignition systems, spark-type; interference; extension of time, 1838
Organization and functions:
Common Carrier Bureau, Chief; authority delegation; cable television pole attachment complaints, 19886
Personal radio services:
Digital transmission systems; modifying low pass audio filtering requirements; extension of time, 6822
Directional antennas at stations located at high elevations in southern California; inquiry, 35360
Radio astronomy operations; procedures to minimize potential interference, 51048
Practice and procedure:
AM broadcast stations; directional antennas, radiation pattern conversions; inquiry; extension of time, 3402, 16783
Cable television; pole attachment complaint procedures, 19886
Ex parte communications in informal rulemaking proceedings, 27868, 32832, 18880
Fee refunds and future fee program; inquiry, 46658, 53474
International record carriers; scope of operations in continental U.S., 34167, 46982, 57167, 60625
Public participation in proceedings; reimbursement, 30834, 41241
Responses to FCC inquiries and making of misrepresentations to FCC; terminated, 14692
Stations, operation requirements; notification of commencement, 19690
Written responses to FCC inquiries and making of misrepresentations to FCC, 14693
Public safety radio services:
Alaska, common emergency frequency for use by single sideband high frequency stations; terminated, 35352
Digital transmission systems; modifying low pass audio filtering requirements; extension of time, 6822
Directional antennas at stations located at high elevations in southern California; inquiry, 35360
New Orleans Vessel Traffic Services area; frequencies available for port operations, 59110
Radio broadcast services (SEE ALSO Cable television; Educational FM stations; FM stations; Television broadcast stations):
AM broadcast stations; directional antennas, radiation pattern conversions; inquiry; extension of time, 16783
AM stereophonic broadcasting, 48659
Candidates for public office; equal opportunity and access; definition of legally qualified, 13402
Community leader survey, primer amendment, 35357, 41241, 49021
"Community Service" programs, "Public Affairs" program category expansion, etc., 50002, 57624
Directional AM stations; relative phases of antenna currents, 4647
Educational FM and TV broadcast station licenses, noncommercial; eligibility, 30842, 36116
Election candidates, Federal; broadcasting time equal access; enforcement policy; termination, 33765
Employment report form, annual; racial, ethnic, and job categories, definitions, etc., 1511
Handicapped, inclusion in equal opportunity rules; employment report form, annual, 30078, 35356
Minority groups, part-time programming of existing stations; petition by NTIA; inquiry, 55804
Monitoring stations, protection from radio interference, 54106
Multiple ownership of AM, FM and television stations and CATV systems, 36978, 47222
Multiple ownership, of educational FM and TV stations, 31047, 36116
Personal attack; fairness doctrine, 45899, 50005
Public notice of intent to sell broadcast station; withdrawn, 24560
Public service announcement airing by broadcast licensees, 37725, 49022
Standard television; transmission of program related signal, 49334
Radio frequency devices:
Motor vehicle ignition systems, spark type; interference; extension of time, 28007
RF interference to electronic equipment; inquiry, 56062
Television receiver equipment grading, 49550, 51652
Television receiver noise figures; measurement techniques; inquiry, 51650
UHF television receiver noise figures, 15744, 19893
Telephone and telegraph companies:
Financial reporting and accounts, 33560, 39835, 40886
Telephone companies:
Cross ownership rules, telephone company--cable television; processing policies for waivers, 36285, 47576, 56070
Domestic public message services by entities other than Western Union; inquiry, 14080, 24861, 30840, 34823
Intercity private line services; new priority system, 7672, 14088
Jurisdictional separation; integration of rates and services, 13902, 23746, 26336, 30840, 34823, 36978, 55803, 58204
Tariffs; posting, 3596
Telephone industry, primary instrument concept; termination, 34806
Traffic statistics, detailed reporting, 45892, 52263
Telephone companies; extension of lines and discontinuance of service:
MTS and WATS market structure, 9505, 18711
Spanish International Network; authorized user status request, 33942, 40541
Telephone companies; jurisdictional separation:
Integration of rates and services, 4646, 5011, 11835, 13077
Terminal equipment; customer provision impact, 5011
Telephone network, connection of terminal equipment:
"Junk" telephone calls; inquiry, 13589
Lamp and/or annunciator functions of systems; petition denied, 16519
National defense and security, etc.; registration exceptions, 49020, 54666
Telephone recording devices; tariff for service use, 11719
Television broadcast stations; table of assignments (SEE ALSO Radio broadcast services):
Alabama, 3402
Arkansas, 31165
California, 46049, 59404
Delaware, 24715
District of Columbia, 7330, 17508, 24863
Florida, 30841, 40251, 45620, 49022
Georgia, 3597
Idaho, 19693
Illinois, 6113, 39593
Indiana, 39400
Kansas, 47221
Kentucky, 39594
Louisiana, 26083
Maryland, 7330, 14694, 17508, 24863
Mississippi, 40250
New Mexico, 6636
North Carolina, 14694
Oregon, 18711, 20517
Utah, 1970
Virginia, 7330, 13592, 17508, 24863
Wisconsin, 6113, 46875
Television broadcast stations (SEE ALSO Radio broadcast services):
Children's programming and advertising practices; inquiry; reactivation, 37136, 46048
Multiple ownership; top-50 market policy, 17982, 29151, 40885
Multiple ownership of AM, FM and television stations and CATV systems, 36978, 47222
Network practices, commercial; programming acquisition and distribution, 50126, 56251
Network representation of TV stations in national spot sales; exemptions, 45895, 54279, 59404
Subscription television; authorization, cut-off procedures, etc., 1516, 2413, 10710, 23618
Subscription television service; withdrawn, 43744
TV towers, common use of, 24717, 30584, 36116
VHF stations, adding in top 100 markets; estension of time, 1510

**NOTICES**

Advisory committee review; inquiry, 5886
AM broadcast applications ready and available for processing, 13916, 31232, 48015, 48710, 49560, 58118
AM stereophonic broadcasting; inquiry; extension of time, 5571
Amateur radio service; call sign assignment system, 15493
Board of Commissioners; establishment, 36688
Cable television:
Economic relationship with broadcast TV; inquiry; extension of time, 1542, 58227
Proof of performance, tests, 11854
Canada-U.S. FM agreement (1947); Table A amendment, 2440
Canada-U.S. television agreement (1952); Table A amendment, 2442

Canadian standard broadcast stations; notification list, 1651, 11852, 13916, 20081, 23013, 29358, 33320, 41434, 54136
CB radios, used 23-channel, marketing cut-off date extension; petition denied, 19718
Committees; establishment, renewals, terminations, etc.:
Cable Signal Leakage Advisory Committee, 3435
Marine Services Radio Technical Commission, 1838
National Industry Advisory Committee, 32186
Personal Use Radio Advisory Committee, 13627
Conventional land mobile systems; release of channel pairs from reserve pool, 35394
Deaf and hearing impaired, telecommunications services; inquiry, 7263, 19292
Docket number assignments; new numbering system adopted, 3435
Domestic public radio services; applications accepted for filing, 1534, 1836, 2927, 3939, 4676, 5887, 7261, 7702, 8846, 10437, 10974, 12083, 13624, 15006, 15496, 18024, 18028, 19714, 20551, 22067, 24133, 24743, 25472, 26127, 28036
Domestic public radio services; applications accepted for filing; publication policy, 25737
Election candidates; broadcasting time equal access; enforcement policy, inquiry, 12938, 16809
Emergency Broadcast System; closed circuit test, 8849, 23757, 46078, 60335
Employment nondiscrimination; memorandum of understanding with EEOC, 12936, 15493, 38109
Environmental statements; availability, etc.:
Tucson FM Broadcasting Corp., Ariz.; antenna and transmitter, 48714
Fairness doctrine, handling of public issues under; inquiry, 9201, 18030, 30125
Fee refund program; meeting, 50505
Flow through proceeding; waiver of ex parte rules, 7705
FM, Canada-U.S. agreement (1947); Table A amendment, 2440
FM broadcast applications ready and available for processing, 10439, 13096, 13626, 15497, 17538, 28043, 30883, 36688, 37761, 40918, 46581, 46899, 46900, 47282, 48015, 49049, 54293, 56935, 56938, 58118, 58869
FM quadraphonic broadcasting; inquiry; extension of time, 1542, 4678
FM translator applications ready and available for processing, 3942, 6651, 11853, 15007, 17537, 22778, 29188, 34536, 39424, 51139, 53818
Improving Government regulations, 48707
International record carriers; scope of operations in continental U.S., 2930
Lobbying, regulated carriers; accounting and reporting expenses, 59127
Meetings:
Cable Signal Leakage Advisory Committee, 12938, 28851, 44566
Common Carrier Bureau, 41436
Fee refund program, 50505
Marine Services Radio Technical Commission, 1541, 2443, 3436, 4110, 8032, 8182, 10440, 13097, 16809, 19920, 23759, 28044, 29029, 34539, 36140, 37760, 41435, 45477, 50505, 54138, 55462, 60998
National Industry Advisory Committee, 5571, 5572, 7367, 18767, 39606
Personal Use Radio Advisory Committee, 4678, 13627
Private Land Mobile Advisory Committee, 24747, 28044, 31233, 42305
Meetings; Sunshine Act, 1581, 1582, 2273, 3008, 3339, 3340, 4175, 4176, 5468, 5914, 6353, 6354, 6715, 7082, 7395, 7396, 8057, 8344, 9405, 10467, 10468, 10679, 11892, 12986, 14371, 14794, 15835, 16644, 17444, 19103, 19496, 19497, 19753, 20367, 21104, 21407, 21408, 22153, 23084, 24168, 24789, 28082, 28083, 31100, 31101, 32025, 32530, 34863, 35158, 36030, 41333, 42347, 42348, 43615, 43616, 43813, 45942, 46626, 47076, 47359, 47649, 48812, 48813, 49106, 49603, 50280, 51196, 51503, 51896, 52090, 52091, 52846, 53101, 53567, 53896, 54350, 55309, 55560, 55561, 56755, 56996, 57222, 58011, 58703, 58893, 59611, 59968, 59969
Mexican standard broadcast stations; notification list, 20082, 24726, 32871, 47610, 54137, 58228
Mexico-U.S. television agreement (1952); Table A amendment, 2441
Minority buyers listing, broadcast facilities; establishment, 52054
Minority ownership of broadcasting facilities; distress sale policy clarification, 47612
Minority ownership of broadcasting facilities; policy statement, 25188
Overseas communications facilities; future licensing policy and guidelines; availability, 35
Political broadcasting and cablecasting primer; summary of statutes, Commission rules and policies, and court decisions, 36342, 37977
Press use of domestic private line service, preferential rates, 19916
Privacy Act; systems of records, 18019
Privacy Act; systems of records; annual publication, 43633
Programming report, annual; composite week dates, 29029, 54136
Public safety and special radio services; corporate applicants; use of current application forms for licenses, 46899
Radio broadcast services:
Multiple ownership of AM broadcast stations, etc.; transmittal sheet corrections, 48013
Radio broadcast applicants; financial qualifications standard, 34841
Radiotelegraph operator code examinations, commercial; use of typewriters at; terminated, 26480
Real estate brokers, mobile unit licensing; policy clarification, 46581
Rulemaking proceedings, informal; ex parte presentations, 50735
Rulemaking proceedings filed, granted, denied, etc.; petitions by various companies, 3435, 5062, 6829, 8032, 8033, 8849, 12940, 13629, 18738, 20553, 21938, 23759, 24912, 28041, 28220, 29028, 30883, 34841, 38088, 38090, 40316, 41434, 43065, 46078, 49849, 53817, 55820, 57345
Satellite communications; unauthorized interception and use, 46581
Satellite communications services; applications accepted for filing, 1536, 1540, 2226, 2443, 2929, 5889, 6650, 7260, 8294, 8847, 10976, 13094, 13095, 15008, 16406, 18031, 19291, 21032, 22778, 25383, 25866, 28040, 15495B
Satellite communications services; applications accepted for filing; publication policy, 25737
Sponsorship identification and candidate authorization; joint policy with FEC, 30126
Standard broadcast applications ready and available for processing, 6653, 25186
Telephone companies:
Exchange network facilities for interstate access, interim charges; inquiry, 59129
Telephone network, connection of terminal equipment:
"Grandfathered" PBX and key telephone systems, 21937, 26612
Telephone primary instrument; industry concept; inquiry, 6151
Television, Canada-U.S. agreement (1952); Table A amendment, 2442
Television, Mexico-U.S. agreement (1952); Table A amendment, 2441
Television broadcast applications ready and available for processing, 2226, 15364, 24132, 25737, 30891, 32327, 32860, 33321, 36140, 39423, 40059, 41433, 46906, 53819, 60999
Television broadcast signals; technical standards, 36689
Television broadcast stations; table of assignments:
Oregon, 13629
Television translator applications ready and available for processing, 3942, 6651, 11853, 15007, 17537, 22778, 29188, 34536, 39424, 51139, 53818, 58118, 58889
Transatlantic communications facilities construction and use plan; licensing policies, 51722
World Administrative Radio Conference, 5887, 9529, 16809, 18748, 18761, 19915, 19920, 20865, 21518, 21937, 21944, 22779, 24747, 26479, 29188, 29626, 32327, 36139, 50505
*Hearings, etc.:*
Air Communications Co. et al., 7366
American International Development, Inc., et al., 13623
American Satellite Corp., 10971
American Telephone & Telegraph Co. et al., 3939, 4110, 10731, 11750, 15005, 17048, 18020, 30616, 39423, 57181, 58861
American Television Relay, Inc., 5052
Andromeda Broadcasting System, Inc., et al., 2223
Beehive Telephone Co., Inc., 38470
Beep Communication Systems, Inc., et al., 30121, 34537
Bie Broadcasting Co., 28852
Blair County Broadcasters, Inc., 38093, 40313
Bonduel Telephone Co., 18021
Brown, Warren K., 52286
Case, Charles S., Sr., 40313
Case, Roy C., 30124
Casper Air Service, Inc., et al., 2925
Castelletti, Joseph E., Jr., 25739
Central Alabama Broadcasters, Inc., 36324
Chapman T.V. & Electronics et al., 38468
Charlottesville Broadcasting Associates, Inc., et al., 48712
Commercial Communications Inc., et al., 58118

Communications Satellite Corp., 52053
Comsat rate case, 8030, 11750, 15005, 17048
Contact-Colorado Springs, Inc., et al., 13917
Cranbury Communications Co., 27602
Daves Park Court Standard, 15009
Davis, David L., 24910
Dunn, Edward, 17399
DuPage Aviation Corp. et al., 3621
Elliott, Maxie Lynn, 40315
Erway, Guy S., et al., 16808
Faith Center Inc., 47282
Gaines, Clement C., 15497
Gene's 24 Hour Towing Service, 7366
Gilmore Broadcasting Corp. et al., 11752
Golden Broadcasting Systems, Inc., 33963
Goldrush Broadcasting, Inc., et al., 30886
Gould, Albert H., 38093
Grace Missionary Baptist Church, Inc., et al., 17400
Granfalloon Denver-Educational Broadcasting, Inc., et al., 49560
Graves, Jerry M., 17401
Gray-Schwartz Broadcasting et al., 13626
Gulf Coast Communications, Inc., et al., 38094
Happy Broadcasting Co., Inc., 1536
Henry, Patrick, 52054
Home Service Broadcasting Corp. et al., 35535
Hosiden Electronics Co., Ltd., 30618
Hub Oil Co., Inc., 45474, 46581
Illinois Bell Telephone Co. et al., 46900
Independent Music Broadcasters, Inc., 1538, 3175, 4887
ITT World Communications, Inc., et al., 25737
Johnstown Aviation et al., 2926
Kaltrim Broadcasting Co. et al., 32859
Kankakee Telephone Answering Service, Inc., et al., 50042
Lafayette Electronics International, Inc., 30886
Lavin, James R., 10616
Lepley, John P., 51140
Lewel Broadcasting, Inc., et al., 10731
Madison County Broadcasting et al., 19918
Margaretville Tel Viz, Inc., 10977
McCluney, S.C., 2926
MCI Telecommunications Corp., 37749, 46365
Midwestern Relay Co., 35386
Minnesota Mobile Telephone Co. et al., 13917
Motion Picture Association of America, Inc., 19717
Moulton Broadcasting Co. Inc., et al., 43766
Namoum, Thomas M., et al., 52284
Navajo Communications Co. Inc., et al., 43766
Nuance Corp. et al., 48713
Offshore Telephone Co., 19715
Oliphant, Burt H., et al., 5060
Olson Electronics, 30887
Peoples Broadcasting Corp. et al., 37754
Radio Dispatch Corp. et al., 16223
Radio Greenbrier, Inc., et al., 51141
Radio Shack, 30889
Radio Station WABZ, Inc., et al., 10732
Radio Wheeling, Inc. et al., 45639
RCA American Communications, Inc., et al., 9531, 11752, 14730, 35391
RCA Global Communications, Inc., 9348, 11602, 34537
Research Educational Foundation, Inc., 6652
Rose Broadcasting Corp. et al., 35539
Sichert, John W., 2935
SJR Communications, Inc., 13627
South Broadcast Corp. et al., 8849
Southeastern Bible College, Inc., et al., 34539
Southern Bell Telephone & Telegraph Co. et al., 36001
Street Broadcasting Corp., 51723
Superior Homes et al., 15498
Tanner Electronic Systems Technology, Inc., 3943
Tele-Comm, Inc., et al., 45475
Telexport, Inc., 30890
Texas Community Antennas, Inc., 34203
Trans Regional Air et al., 47282, 50043
Translator Services, 28853
Tsimpides, Lycurgus G., 18033
Tuscola Broadcasting Co. et al., 34209
Voice of the Orange Empire, Inc., Ltd., et al., 46906
WACB, Inc., 23758
WIGO, Inc., 8848
WIOO, Inc., et al., 1541
WJPD, Inc., 10439
WMOA, Inc., 24384
WABZ, Inc., et al., 8181
Webster-Baker Broadcasting Co. et al., 49561
Weir Aircraft Service et al., 7367
Western Union International, Inc., 9348
Western Union Telegraph Co., 11753, 18033, 21938
Whitney, E. Boyd, 1837
Wilson, Charles W., Jr., et al., 9530
Woodstock Communications, Inc., et al., 1838
Yanda, Russell V., et al., 14730
Yuhas, Thomas E., 27604

## FEDERAL CONTRACT COMPLIANCE PROGRAMS OFFICE

**RULES**

Employee selection procedures; uniform guidelines, 38314
Equal employment opportunity; compliance responsibility, 49240, 51400
Women in construction, affirmative action obligations of contractors and subcontractors, 14894, 18672

**PROPOSED RULES**

Employee selection procedures; uniform guidelines; correction, 1506
Sex discrimination guidelines:
  Employee benefits, 38057

**NOTICES**

Contract sanctions:
  American Sanitary Sales & Service Co., Inc., 30904
  Hahn & Clay Machine & Boiler Works, Inc.; reinstated, 55009
  Painting Corp. of Detroit, Inc., 30919
Equal employment opportunity; Preaward clearance requests; contact points, 43572
Women and minorities in construction; participation goals and timetables, 14899, 19473

## FEDERAL COUNCIL ON THE AGING

*See Aging, Federal Council.*

## FEDERAL CROP INSURANCE CORPORATION

**RULES**

Crop insurance, various commodities:
  Apples, 2381
  Barley, 18536, 19338
  Citrus, 20782
  Corn, 4248, 14638, 15319, 18536, 19338
  Forage, 15319, 38682
  Forage seeding, 16693, 18537
  Grain sorghum, 38681
  Grapes, 60428
  Oats, 18536, 19338
  Peaches, 56206
  Peanuts, 26561
  Potatoes, 14639, 15319, 18536, 19338
  Rice, 2381
  Sugarcane, 36423, 41372, 44819
  Tobacco, 2382, 2383, 2384
  Tomatoes, 2380
  Wheat, 15320, 18536, 18537, 19338

**PROPOSED RULES**

Crop insurance, various commodities:
  Citrus, 9616
  Forage, 25826
  Peas, 52723, 56045
  Soybeans, 52722
  Tobacco (flue cured), 38411

## FEDERAL DEPOSIT INSURANCE CORPORATION

**RULES**

Applications, requests, and submittals:
  Authority delegation; suspend time deposit withdrawal penalties, 9788, 9789
  Community reinvestment, 47158
  Section 19 applications; employment with insured banks, 48622
Community reinvestment, 47151
Conduct standards; conflict of interest, 60267
Deposit insurance coverage, clarification and definition:
  IRA, Keogh time, and savings deposits, insurance maximum, increase, 58081
  Pension benefit plans, 10683
Fair housing; advertising, poster, and recordkeeping requirements, 11564, 18540
Information:
  Disclosure; public access to confidential records, 17804
Interest on deposits:
  Rates on time deposits, maximum, 21437, 23559, 24270, 25994
  Savings accounts; automatic transfers, 20223
  Savings accounts; rate limitations on transfers to checking accounts, 54082
  Treasury Department; purchase of funds, 9789, 20223
Securities of insured State nonmember banks:
  Disclosure regulations; proxy statements, tender offers, etc., 60562

**PROPOSED RULES**

Advertisement of membership:
  Remote service facility procedures, 46976, 49014

Applications, requests, and submittals:
Remote service facility procedures, 46976, 49014
Community reinvestment, 29918
Community reinvestment; geographic proximity and military personnel, 57259
Conduct standards, 28518, 36461
Financial institutions; credit needs of local communities, assessment; hearing, 3370, 7243, 13074
Forms, instructions, and reports:
Remote service facility procedures, 46976, 49014
International Banking Act of 1978, implementation; advance notice, 60279
Practice and procedure:
Development and review of rules and regulations, 53042, 54665
Securities of insured State nonmember banks:
Disclosure regulations under Securities Exchange Act; conformance with SEC, 10401
Securities transactions; recordkeeping and confirmation requirements, 7441, 15432, 51638
Unsafe and unsound banking practices:
Insider transactions; recordkeeping requirements, 4051, 60283

NOTICES

EDP examination, scheduling and report distribution; policy statement, 25739
Equal credit opportunity and fair housing; enforcement guidelines, 29256
Improper payments by banks and bank holding companies, joint policy, 2759
Improving Government regulations; inquiry, 29988
Income tax remittances by banks to holding company affiliates; policy statement, 22241
International banking:
Puerto Rico; bank branches located in U.S.; FDIC coverage extension, 45919
Meetings:
State and Federal Regulation of Banks Advisory Committee, 1129, 48714
Meetings; Sunshine Act, 1169, 1170, 1669, 1670, 2045, 2686, 3008, 3009, 3238, 3668, 3669, 4538, 5469, 6196, 6197, 7393, 7396, 7397, 8224, 8344, 9406, 9928, 9929, 10788, 14372, 14598, 15404, 16256, 16880, 16881, 17627, 18829, 18830, 19985, 20367, 20891, 21104, 21978, 22517, 23085, 24168, 24790, 25528, 25529, 25771, 26680, 26880, 28328, 29886, 29887, 31304, 32531, 32923, 32924, 34573, 35159, 35431, 36585, 38991, 39637, 40100, 42348, 42349, 43084, 43616, 45687, 45688, 46155, 46922, 47077, 48098, 50280, 50281, 51196, 51503, 51504, 52846, 53102, 55055, 55561, 56755, 56756, 58893, 58894, 58895, 59969, 60249, 60719, 11298A
Nondiscrimination in real estate loan activities; fair housing policy statement rescission, 28552
Privacy Act; systems of records; annual publication, 37152
Savings deposits, automatic transfers; FRS proposal; inquiry, 7705
Securities trading suspension:
Banco Credito Y Ahorro Ponceno, Ponce, P.R., 10977, 12940

## FEDERAL DISASTER ASSISTANCE ADMINISTRATION

RULES

Disaster assistance:
Individual and family grants; eligibility criteria, 4256, 22030
Legal services, 19230
Small project applications (in-lieu contributions), 18992
Temporary housing assistance, 8765

PROPOSED RULES

Comprehensive hazard evaluation and mitigation; inquiry, 30030
Disaster assistance:
Temporary housing, 27206

NOTICES

Disaster and emergency areas:
Alabama, 19466, 40062
Arizona, 13635, 13923
Arkansas, 7056, 19467, 46383
California, 10445, 13635, 13923, 22083, 50509, 53819, 54699
Connecticut, 7717
Indiana, 7056, 7718, 17871
Louisiana, 22084, 46383, 59443
Maine, 10445
Massachusetts, 7718, 10446
Michigan, 7056, 7718
Minnesota, 19467, 31239, 32464
Mississippi, 19467, 25741
Montana, 25741, 26798
Nebraska, 17871, 17872, 19468
New Hampshire, 10446
New York, 38115
North Dakota, 10446, 10447, 19468, 22084, 31240
Northern Mariana Islands, 40062
Ohio, 7057, 7719
Rhode Island, 7719, 10447
Texas, 38116, 38117
Washington, 1654, 3947
Wisconsin, 31240
Wyoming, 25741

## FEDERAL ELECTION COMMISSION

PROPOSED RULES

Labor and corporate organization activity; communication costs; reporting duties; inquiry, 14673
Presidential Election Campaign Fund:
Financing conventions, primary matching fund, and general election; inquiry and hearing, 23587

NOTICES

Advisory opinion cumulative index; availability, 50736
Clearinghouse Advisory Panel; annual comprehensive review, 9350
Federal Election Campaign Act and Internal Revenue Code, statutory responsibility guide; memorandum of understanding with Justice Department, 5441
Meetings; Sunshine Act, 2045, 3791, 4748, 5131, 5914, 7294, 7796, 8921, 9406, 9550, 9929, 10679, 11656, 12436, 13656, 13966, 14373, 15055, 16257, 17112, 18399, 19497, 20611, 20892, 21791, 22805, 24168, 25224, 26183, 27280, 29662, 30644, 31502, 32924, 34024, 34573, 36030, 36759, 38504, 40101, 40601, 41334, 43084, 44965, 46155, 46626, 49106, 50539, 51197, 52601, 55309, 56336, 57718, 58703, 60249
Multicandidate committees, index, 2758
Policy statements, etc.; vacated, 16547
Privacy Act; systems of records, 32328
Procedure rules, 31433
Sponsorship identification and candidate authorization; joint policy with FCC, 30126

## FEDERAL ENERGY ADMINISTRATION

*See Economic Regulatory Administration.*

## FEDERAL ENERGY REGULATORY COMMISSION

RULES

Electric utilities:
Accounts, uniform system; allowance for borrowed funds used during construction, 3557
Accounts, uniform system; reclassifying amortization reserves, 15418
Forms; hydroelectric license, short form, 40217
Licenses, permits, and determination of project costs; hydroelectric license, short form, 40217
Rate schedules filing, office directors; authority delegations, 36437
Statements and reports (schedules); allowance for borrowed funds used during construction, 3557
Statements and reports (schedules); base load liquified natural gas facilities, 19363, 35911
Statements and reports (schedules); reclassifying amortization reserves, 15419
Freedom of informtion; requests and appeals, 46528
Investigations; policy and procedures, 27176
Natural gas companies:
Accounts, uniform system; allowance for borrowed funds used during construction, 3557
Accounts, uniform system, base load liquified natural gas facilities, 19356, 35911
Certificates of public convenience and necessity and abandonment; applications; emergency gas transportation exemptions during coal emergency, 11691
Certificates of public convenience and necessity and abandonment; applications; emergency sales or transportation of natural gas, 56536, 59056, 59481
Certificates of public convenience and necessity and abandonment; applications; office directors; authority delegations, 36437
Certificates of public convenience and necessity and abandonment, etc.; independent producer filing requirements, 55757
Property, units of; base load liquified natural gas facilities, 19361, 35911
Rate schedules and tariffs, independent producers; filing requirements, 55757
Rate schedules and tariffs, jurisdictional pipelines; estimate changes in purchased gas cost, 57247

Rate schedules and tariffs; Louisiana First Use Tax, pipeline recovery, 45553, 60443
Rate schedules and tariffs; purchased gas cost adjustment clause, 50170
Rate schedules and tariffs; purchased gas costs changes recovery, 56034, 56221
Statements and reports (schedules); allowance for borrowed funds used during construction, 3557
Statements and reports (schedules); base load liquified natural gas facilities, 19363, 35911
Statements and reports (schedules); Form 40, annual report of proved domestic gas reserves, 8123
Statements and reports (schedules); Form 40; extension of filing time, 34454, 56036
Statements and reports (schedules); FPC Form 69 filing requirements discontinued and Form EIA 50 issued, 27178
Statements and reports (schedules); reclassifying amortization reserves, 15419
Natural Gas Policy Act of 1978:
Administrative stay, 57599
Interim regulations, 56448, 59056, 59481, 59836
Sales of certain OCS gas, minimum duration for new contracts, 57597
Organization, operation, information, etc.:
Forms, filing and issuance, 27178
Hydroelectric license, short form, 40217
Office directors, authority delegations, 36435
Oil Pipeline Board; establishment and authority delegation, 6765
Photographing and recording of open Commission meetings; restrictions, 20790
Policy and interpretations:
Natural gas, emergency sales or transportation, 56536, 59056, 59481
Natural gas; optional procedure for certificating new producer sales; policy statement, 23564, 48992
Pipeline transportation agreements; certification, 5371, 6764
Practice and procedure:
Adjustment request denials by Energy Secretary; FERC review procedures, 35909
Briefs filed with Commission, references to record, 39983
CFR correction, 41965
Freedom of information; request and appeals, 46528
Office directors, authority delegations, 36434
Photographing and recording of open Commission meetings; restrictions, 20790
Review of remedial orders, 52223
Sunshine Act; implementation, 20790

**PROPOSED RULES**

Accounts, uniform system:
Pipeline companies valuation; submission of briefs, etc.; order vacated, 11725
Electric utilities:
Forms; hydroelectric license, short form, 18196
Licenses, permits, and determination of project costs; hydroelectric license, short form, 18196
Statements and reports (schedules); electric plant fuel cost and quality reports; conference, 5524
Electric utilities, retail service costs; conference, 55257
Natural gas companies:
Alaska natural gas transportation system, conditional certificates of public convenience and necessity; incentive rate of return, 20241, 45595
Certificate requirements; exemptions for temporary sale, delivery, or transportation, 36471
Certificates of public convenience and necessity and abandonment; 60-day emergency review; inquiry, 15730
Priority for essential agricultural uses; hearing, 59091
Rate schedules and tariffs; compensation provisions for curtailment plans; extension of time, 1509, 8270
Rate schedules and tariffs; gas cost adjustment clause or general rate cases, 50191, 53770
Rate schedules and tariffs; rate change filing requirements, 26026
Statements and reports (schedules); rate change filing requirements, 26026
Natural Gas Policy Act of 1978; implementation, 53270
Oil; administrative procedures and sanctions:
Propane and other natural gas liquids; hearing and inquiry, 36264
Organization, operation, information, etc.:
Hydroelectric license, short form, 18196
Petroleum allocation and price regulations:
Aviation gasoline decontrol, 29298, 41224
Kerosene-base jet fuel decontrol, 29298, 41224
Motor gasoline, exemption; recommendations, 14491
Propane and other natural gas liquids; hearings and inquiry, 36264
Pipeline companies:
Accounts, uniform system; valuation; submission of briefs, etc.; order vacated, 11725
Valuation; hearing, 43728, 47542
Policy and interpretations:
Hydroelectric license, short form, 18196
Natural gas certificate requirements; exemptions for temporary sale, delivery, or transportation, 36471
Natural gas companies, curtailment plans; compensation provisions; extension of time, 1509, 8270
Natural gas programs, 60-day emergency review; inquiry, 15730
Rate change filing requirements, 26026
Practice and procedure:
Applications for stays, 40037
Proceedings before the Commission, 39122, 47542
Remedial orders review; hearing, 19669
Settlement agreements; Commission review, 32814.
Reports:
Pipeline companies valuation; submission of briefs, etc.; order vacated, 11725

**NOTICES**

California, Thermalito and Table Mountain Irrigation Districts; Fish and Game Department intervention, 18014
Coal shortage, wholesale power transactions; investigation, 21355, 30334
Committees; establishment, renewals, terminations, etc.:
Pipeline Valuation Advisory Committee, 47605
Complaints, petitions, etc.:
Concerned Citizens Against Power Monopoly et al., 27585
Institute for Public Interest Representation, 32325
Electric facilities observation by Commissioners, etc.:
Philadelphia Electric Co., Susquehanna River in Md. and Pa., 17866
Environmental statements; availability, etc.:
Copper Valley Electric Association, Inc., 8834
Michigan Wisconsin Pipe Line Co. et al., 3540
Pacific Gas & Electric Co., 12930, 37008, 59424
Prattsville pumped storage project, 25466
Sitka, City and Borough of, Alaska; Green Lake Dam, etc., 49048
Western LNG Terminal Associates et al., 17039, 50237
Headwater benefits investigations; new docket prefix and numbers, designation, 12927
Hydroelectric project licenses; specified reasonable rate of return, 6834
Land withdrawals:
Alaska, 7355, 8585, 25366
California, 24732, 26788, 54287
Colorado, 3741, 6308, 7356, 8586, 8588, 14354, 26787
Idaho, 3743, 26787
Oregon, 3742, 28241
Utah, 26787
Washington, 29979
Wyoming, 6311, 7359, 14354, 34535
Meetings:
Gas Policy Advisory Council, 5876, 18245
Natural Gas Policy Act, implementation, 54132
Meetings; Sunshine Act, 1171, 1431, 1671, 2045, 2686, 3009, 3010, 3238, 3340, 3669, 3791, 3990, 4176, 4749, 4914, 5131, 5645, 5914, 6195, 6354, 6715, 6903, 7082, 7393, 7518, 8057, 8058, 8225, 8345, 8682, 8921, 9218, 9929, 9930, 9931, 10468, 10679, 10788, 11036, 11656, 11785, 11892, 12180, 12436, 12437, 12812, 12988, 13484, 13656, 13657, 14272, 14598, 14794, 15404, 15553, 15835, 16257, 16258, 16645, 16881, 17112, 17445, 17627, 17907, 18399, 18627, 18830, 19104, 19497, 19753, 19986, 20085, 20368, 20611, 20892, 21562, 21791, 21976, 21977, 22153, 22296, 23085, 23086, 23675, 23842, 24404, 24653, 25225, 25405, 25771, 26183, 26361, 26681, 27281, 27639, 28083, 28611, 29408, 30185, 30390, 30644, 31101, 31304, 31503, 32025, 32220, 32368, 32924, 33372, 33873, 34573, 34574, 35619, 36030, 36339, 36585, 36759, 37073, 38166, 38664, 38783, 39214, 39479, 40101, 40349, 40350, 40601, 41159, 41334, 41465, 42349, 42852, 43408, 43409, 43617, 44611, 44965, 46155, 46416, 46417, 46626, 47649, 47650, 48813, 48814, 49107, 49411, 50124, 50281, 50282, 50799, 51504, 51750, 52358, 52601, 52847, 53896, 54174, 54775, 55055, 55309, 55310, 55562, 56153, 56336, 56756, 56996, 58011, 58471, 58895, 59455, 59970, 60249, 60367, 11298A
Natural gas companies:
Alaska Natural Gas Transportation System, conditional certificates of public

convenience and necessity; incentive rate of return, 45595, 57649
Certificates of public convenience and necessity; applications, abandonment of service and petitions to amend, 790, 792, 794, 1379, 2757, 3310, 3424, 4099, 4107, 4283, 5409, 6644, 7347, 8013, 8025, 8835, 9634, 12367, 13610, 13612, 14995, 15770, 17040, 17041, 18746, 19442, 20272, 20543, 21499, 21717, 22440, 23632, 23755, 24736, 25460, 25857, 25858, 27231, 27887, 30867, 31060, 31062, 32174, 32176, 32452, 33801, 35097, 38077, 38463, 39169, 39414, 49350, 49354, 51833, 52045, 54127, 57941, 60637
Small producer certificates, applications, 1640, 2757, 3312, 4089, 4090, 4099, 5037, 5409, 8174, 11256, 14536, 14719, 15772, 18244, 20041, 21719, 22440, 25462, 25864, 27891, 29177, 32452, 38080, 43544, 56720, 60641, 60991
Natural Gas Policy Act of 1978:
Determination process report receipts, 57331, 58117, 58428, 60646
Implementation; public conference for State regulators, 54289
Implementation seminars, 54132, 57962
Pipeline carriers:
Construction indices; 1977 annual, 17534
Oil pipeline docket prefixes, designation, 9651
Tentative valuation reports, 27233, 47000, 50501
Valuation of pipelines; extension of time, 1532, 7352
*Hearings, etc.:*
ADA Resources, Inc., et al., 33809
ANR Storage Co., 35526
Adair Oil Co., 8179, 37210
Adobe Oil and Gas Corp., 47251
Alabama Electric Cooperative, Inc., et al., 26474
Alabama Power Co. et al., 1524, 1818, 2207, 2431, 3305, 7355, 7687, 8287, 8836, 21375, 24118, 29978, 35092, 37481, 47995, 54984, 59116
Alabama Water Improvement Commission et al., 5041
Alabama-Tennessee Natural Gas Co. et al., 7687, 16381, 18740, 24888, 26104, 27583, 35525, 36299, 45433, 58408, 58409, 60191
Alaska Natural Gas Transportation System, 24573
Alaskan Northwest Natural Gas Transportation Co., 29602
Alcan Pipeline Co., 18741
Alcoa Generating Corp. et al., 6831
Algonquin Gas Transmission Co. et al., 7687, 15179, 16536, 20265, 20267, 21348, 24119, 25367, 35377, 35525, 38893, 43540, 45439, 45440, 47995, 47996, 49831, 50025, 54285, 57332, 58409
Algonquin LNG, Inc., et al., 15481, 29170, 49832, 52276, 54984
American Electric Power Service Corp., 16800, 24572
American Natural Gas Production Co. et al., 3306, 12910
American Petrofina Co. of Texas et al., 3306, 17038, 31963, 35525, 50026
Aminoil Development, Inc., 4089
Aminoil USA, Inc., 41076
Amoco Production Co. et al., 30094, 35526, 60331
An-Son Corp., 43345, 43541
Anadarko Production Co., 60191
Anderson, Gerald E., 40278
Anza Electric Cooperative, Inc., 25720
Appalachian Power Co. et al., 12363, 17042, 21348, 21932, 21933, 59117
Arapahoe Production Co. et al., 25369
Area rate proceedings, 10719, 12065, 12066, 13616, 14350, 16381, 17859, 29170, 36504, 38910, 40300, 50956, 51700, 57330
Arizona Public Service Co., 1641, 5047, 6831, 11593, 14984, 15354, 21348, 21499, 25370, 27583, 29171, 34831, 36300, 40277, 59117
Arkansas Louisiana Gas Co. et al., 8579, 10435, 13421, 14985, 14996, 16800, 17996, 19273, 23630, 31209, 36301, 36504, 36994, 38452, 38898, 40905, 43345, 45440, 47245, 49037, 51700, 51831, 53797, 57332, 57944, 58409, 58852, 59118
Arkansas Oklahoma Gas Corp., 38898
Arkansas Power & Light Co., 6831, 7688, 21348, 21349, 21375, 24573, 30865, 32322, 40905
Arkansas-Missouri Power Co. et al., 14985, 24730, 33953, 49038
Art Machin & Associates Inc., 3927
Ashland Exploration, Inc., 25861, 30331
Ashland Oil, Inc., 3306, 30866
Ashton, Philip T., 27593
Atlantic Richfield Co. et al., 15354, 29171, 57643
B. J. Oil Co., 53797
Baca Gas Gathering System, Inc., 2211
Bailey, Walter E., 24586
Baltimore Gas & Electric Co., 50491
Bangor Hydro-Electric Co., 26474, 40289, 43347
Barth Energy Corp., 53797
Bass Enterprises Production Co., 36301, 36995
Bayou State Oil Corp., 39415, 47252, 50957, 51831
Beacon Gasoline Co., 19273, 27584
Bear Creek Storage Co. et al., 17859, 43347, 47295
Bechanan, William B., 26791
Belco Petroleum Corp., 33809
Bishop, Robert W., 27594
Black, William A., 40282
Black Hills Power & Light Co., 3422, 15355, 21375, 25370, 36995
Blackstone Valley Electric Co., 38893
Blue Dolphin Pipe Line Co., 2211, 60639
Blum, Donald R., 29178
Boise Cascade, 5413
Boise Project Board of Control, 17525
Booth, John P., & Associates, et al., 31964, 46074, 56257
Boston Edison Co., 8287, 9516, 11594, 12066, 16801, 17525, 17861, 19432, 23631, 24574, 35986, 40301, 49039, 51701, 52276, 52277, 56259
Bountiful, Utah, City of, et al., 45913
Bradco Oil & Gas Co. et al., 2432
Braden-Deem, Inc., 10719, 21349, 50732
Branch Investment Corp., 60191
Bright & Co., 14350
Bright & Schiff, 9648, 10720, 29176, 41076
Britt, Russell W., 7363
Brooklyn Union Gas Co., 17996, 58853
Brown, Donald, 31964
Brown, Maurice L., Co., 6312, 6313, 7360, 7695, 25463, 30334
Brown - New Hampshire, Inc., 42778
Burnett, H. N., et al., 25862
Burstein, Sol, 7352
Byron Oil Industries, Inc., 7250
CIG Exploration, Inc., 34832
C. K. Oil Co., 31965
Callery Properties, Inc., 14986
Canal Electric Co., 1532, 29978
Capital Cities Media, Inc., et al., 3159
Cardinal Operating Co., 15355
Carlyle, Ill. City of, 1387
Carnegie Natural Gas Co. et al., 43549, 59422
Carolina Power & Light Co., 3617, 12748, 20031, 35377, 43347
Cassidy, Thomas J., 7364
Central Hudson Gas & Electric Corp. et al., 4455, 7250, 8287, 19434, 20033, 20042, 60640
Central Illinois Light Co., 52761
Central Illinois Public Service Co., 1527, 9516, 21928, 26475, 31209, 42779, 46067, 46068, 49833, 51831
Central Kansas Power Co., 21349, 26105
Central Kansas Power Co. Inc., 59118
Central Louisiana Electric Co., Inc., 3741, 16381, 30104, 31974, 46073, 50491, 57334, 58410, 60640
Central Maine Power Co., 1819, 15355, 24890, 25713, 32322, 50491
Central Power & Light Co., 2432, 21376, 21500, 26788, 30097, 36302, 37211, 40289, 51831
Central Telephone & Utilities Corp., 1386, 4877, 5873, 23632, 25720
Central Vermont Public Service Corp. et al., 10720, 12910, 38903, 40277, 43347, 43348, 52277, 53798
Central Virginia Electric Cooperative, Inc., et al., 20267, 21933
Chace Oil Co., Inc., 21927
Chattanooga Gas Co., 20033, 29172, 60192
CIG Exploration, Inc., 47258
Cimarron Transmission Co., 39414, 46073
Cincinnati Gas & Electric Co., 2432, 7250, 25371, 26788, 34192, 38452
Cities Service Gas Co. et al., 788, 1641, 3159, 6832, 8014, 13422, 16536, 17997, 20042, 20267, 25860, 26105, 27584, 28236, 29172, 30866, 31209, 31964, 32175, 32323, 33798, 36996, 38453, 43349, 45441, 47259, 50027, 51701, 52761, 54681, 54984, 56092, 56259, 60192, 60193
Clark Oil Producing Co. et al, 4090
Clark-Cowlitz Joint Operating Agency, 21501
Clay Basin Storage Co., 17998, 49833
Cleary, John V., Jr., 12363
Cleveland Electric Illuminating Co., 6307, 26776, 30333
Cliburn, James T., 18245
Cliffs Electric Service Co., 19434, 43541
Colorado Interstate Gas Co. et al., 1387, 1819, 3930, 4091, 6307, 8015, 9636, 9642, 9648, 12910, 13423, 14987, 15185, 16537, 18000, 18001, 20033, 20034, 20035, 20043, 21376, 21928, 24120, 25459, 26105, 26106, 32323, 33809, 35527, 38893, 38903, 40906, 45434, 45441, 45442, 47996, 49834, 51832, 52277, 52278, 53798, 57334, 57335, 57945, 57946
Colorado Oil & Gas Corp., 12911, 37005

Colorado Springs, Colo., City of, 58410
Columbia Gas Transmission Corp. et al., 1642, 1820, 4091, 4092, 4102, 7357, 7689, 8836, 9643, 13424, 14350, 14715, 14716, 16382, 16537, 18002, 19910, 19911, 20036, 20544, 21928, 24120, 24575, 24576, 25721, 26779, 27584, 28237, 29172, 30868, 33810, 34524, 36302, 36303, 37740, 38894, 38903, 40302, 41078, 43348, 43549, 45443, 45914, 47245, 47998, 49040, 49834, 49835, 50029, 50957, 50960, 51832, 53799, 54681, 55816, 57946, 58854, 59899, 60194
Columbia Gas Transportation Corp., 9517
Columbia Gulf Transmission Co. et al., 1388, 3930, 6833, 8016, 8181, 9637, 12912, 17862, 18003, 19274, 24576, 24730, 24891, 27584, 27585, 29177, 29605, 30098, 30333, 30868, 33811, 37481, 40291, 43542, 46068, 47252, 47996, 55817, 58410, 60990
Columbia LNG Corp. et al., 30104, 31974, 35528, 42291
Columbus & Southern Ohio Electric Co., 5413, 47999
Columbus Water & Light Department et al., 2752, 9334
Commercial Pipeline Co., Inc., 49835, 60194
Commonwealth Edison Co., 25371, 32175, 33953, 34192
Commonwealth Edison Co. of Indiana, Inc., 29175
Community Public Service Co., 5041, 57947
Condon, Verner, H., 19288
Connecticut Light & Power Co., 1118, 1532, 1643, 1650, 2212, 7689, 15355, 17530, 24576, 27586, 30333, 35986, 36505, 36996, 40297, 40906, 50491
Connecticut Valley Electric Co. Inc., 24121
Connecticut Yankee Atomic Power Co., 21350, 25371
Consolidated Edison Co. of New York, Inc., et al., 8017, 12066, 18003, 21929, 23632, 38894, 52762
Consolidated Gas Supply Corp. et al., 2212, 2213, 3160, 4092, 4878, 9518, 9643, 11250, 11251, 12911, 13424, 16215, 16216, 16382, 16383, 16802, 17526, 18004, 18005, 19434, 20043, 20545, 21350, 21929, 25721, 26106, 26123, 26779, 26788, 29178, 30334, 30869, 31965, 32324, 37740, 41079, 43348, 43349, 45434, 47246, 47252, 47999, 50029, 50030, 51702, 52279, 53798, 56093, 57335, 58410, 60194
Consolidated System LNG Co., 45435
Consolidated System LNG Corp., 4094
Consumers Power Co., 7250, 9637, 17526, 29173, 41258, 49835, 50492, 52762, 56093, 57335
Continental Oil Co. et al., 3161, 21929, 26774
Coos-Curry Electric Cooperative, Inc., 26106
Cordillera Corp., 18005, 36303, 46363
Coronado Transmission Co., 9518
Counsil, William G., 27599, 40282
Cox, Edwin L., 37212, 50492
Coyne, Frank E., 6312
Crisp County Power Commission, 58411
Crooke, Edward Austin, 19280
Crown Zellerbach Corp., 23632, 37482
Daniel Oil Co., 26107
Davis, Claud Frederick, 43541
Davis, Paul R., et al., 24583
Dayton Power & Light Co., 3307, 12076, 20043, 40907, 43550, 47999
Delhi Gas Pipeline Corp., 31210
Delmarva Power & Light Co. et al., 9638, 17531, 25721, 29606, 39415, 50492, 58614
Delta Drilling Co., 16537
DeMaria, Peter J., 21367
Des Arc, Ark., City of, et al., 28235, 36303
Detroit Edison Co., 3308, 6833, 34192, 43542, 47999, 50492, 57948
Devon Corp. et al., 57335
Distrigas Corp. et al., 59886
Distrigas of Massachusetts Corp., 1121, 47246
Dixel Resources Inc., 24892
Dolan, John E., 31209
Donovan, Raymond E., 19283
Dorchester Gas Producting Co. et al., 36303, 45443, 50960, 58617
Dorfman Production Co., 8580
Dougherty, Dudley Tarlton, estate of, et al., 43350
Drinkwater, Terrell C., 25373
Duke Power Co., 1127, 3162, 4102, 5041, 5416, 8287, 8288, 12066, 17526, 19279, 23633, 25713, 25721, 30099, 30100, 32324, 36506, 40907, 43350, 43550, 51702, 56093, 60640
Duncan, J. Walter, Jr., et al., 33819, 37213
Duncan, W.A., 26791
Duquesne Light Co., 23633, 37740
Earlsboro Oil & Gas Co., Inc., et al., 35986
East Tennessee Natural Gas Co., 7251, 16383, 16538, 16802, 17526, 18005, 18245, 22239, 24731, 25373, 25722, 26475, 28237, 35382, 40291, 43542, 48000, 56094, 58411, 59886
Eastern Pennsylvania Exploration Co., 31209
Eastern Shore Natural Gas Co., 1123, 4878, 9645, 10720, 12913, 13424, 18006, 23633, 25722, 30869, 37741, 38904, 51832
Ecee, Inc., et al., 20043
Edison Sault Electric Co., 7357, 7692
El Paso Electric Co., 1119, 14351, 19436, 27586, 32454, 33799, 36305, 36506, 40292, 43350, 43543, 56260
El Paso Natural Gas Co. et al., 1390, 1391, 4879, 5874, 7357, 7358, 7689, 7692, 8838, 9649, 10720, 10721, 11251, 11252, 11594, 12067, 12913, 14351, 14987, 14989, 16538, 16803, 17862, 19275, 20037, 20045, 20545, 21351, 21352, 21933, 23633, 23634, 23635, 24731, 25725, 25728, 27586, 29179, 30869, 31210, 31965, 34193, 35092, 35986, 36132, 36133, 36134, 36135, 36136, 36137, 36304, 37007, 37212, 37742, 38454, 38455, 38894, 40277, 40294, 43351, 43352, 43543, 45436, 45443, 45444, 45445, 46069, 46571, 48000, 49040, 50031, 54681, 57335, 57336, 57948, 58411, 58412, 58617, 58855, 59423, 59899, 60194, 60195
Electric Energy, Inc., 25722
Ellis, William B., 27600
Elms Brothers & Co., 14997, 41267
Elrod, Hubert K., et al., 24122, 25720
Empire District Electric Co., 42779, 51702
Enerco, Inc., et al., 1392
Energy Development Corp., 58412
Energy Reserves Group, Inc., 9519
English, William N., 46076
Equitable Gas Co. et al., 15356, 20546, 26780, 51837
Equitable Petroleum Corp., 15356, 37212
Escondido Mutual Water Co. et al., 22236
Everman, C. Robert, 31966
Explorer Pipeline Co., 15356
Exxon Pipeline Co. of California, 24577, 43550
Farnan, John T., 29182
Fee, Walter F., 27598
Felmont Oil Corp., 12068
Finadel, Inc., 36305
Fischer, Frank E., 25373
Fitchburg Gas & Electric Light Co., 50032, 58412
Florida Cities et al., 3930, 26107
Florida Gas Transmission Co. et al., 1119, 3425, 4099, 12068, 12069, 13616, 16804, 23635, 26108, 31211, 36305, 38456, 38895, 38899, 49041, 52762, 56094, 59886, 60195
Florida Power Corp., 1124, 1650, 3425, 12749, 21377, 29173, 31975, 33953, 39850
Florida Power & Light Co., 1381, 3162, 5876, 6834, 13424, 13425, 13616, 16384, 17864, 18742, 19436, 19911, 21352, 23636, 24122, 24893, 25373, 25727, 26789, 29173, 29174, 29978, 31975, 35093, 36306, 36506, 38899, 39416, 40283, 45446, 53799, 57950
Ford Motor Co., 2214
Frazer, Robert E., 35993
Freeport Oil Co., 59900
Gas Gathering Corp., 25714, 28237, 32455, 55817, 59900
Gas Producing Enterprises, Inc., 24122, 31212, 31430
Gas Research Institute, 12913, 25172, 30100, 37482, 41258, 45447, 53800, 56261, 57947, 58412, 58413, 59118, 59119, 60196, 60197, 60198
Gas Rock Corp. et al., 47258
Gas Transport, Inc., 21353
Georgia Power Co., 2433, 6309, 8181, 9520, 11253, 18245, 20046, 25374, 37482, 43353, 50032, 54286, 59119
Gibson Drilling Co., 25462, 54287
Ginther, N.C., et al., 24127
Gleeson, Lawrence, 1645
Go Distribution Co., 36306
Godfrey Oil Properties et al., 58618
Goldking Production Co., 17864
Good Hope Refineries, Inc., 3162
Goodlett, Orion M., 43353
Gorske, Robert H., 7352
Grace, Henry Production Co., 52763
Grace, W. R., & Co., 31966
Grand Bay Co., 60198
Grand River Dam Authority, 1392
Granite State Gas Transmission, Inc., 16804, 21353, 29176, 29180, 59887, 59901
Great Lakes Gas Transmission Co., 11595, 12926, 14718, 16804, 16805, 18006, 20046, 21929, 29180, 34832, 41258, 45437, 46069, 58413, 58414
Great Northern Nekoosa Corp., 19280, 19911, 19912
Great Plains Gasification Associates et al., 29181
Green Mountain Power Corp., 1124, 4879, 16384, 21353, 21354, 33811, 57644
Gresham, Wis., Vilage of, 27587
Griffin, Thomas A., Jr., 25374, 29168
Gulf Oil Corp., 3163, 14990, 29175

Gulf States Utilities Co., 8835, 13425, 16384, 23637, 24577, 30870, 33953, 37483, 38895, 43353, 45456, 50493, 57337, 57951
Hamman, Blake, 53797
Hankamer, Curtis, 32175
Hartford Electric Light Co., 1124, 1128, 1644, 53800
Hartwell, Robert W., 9522
Hassie Hunt Exploration Co., 56258
Heather, Mary C., 35093
Helmerich & Payne, Inc., 33801
Henry Grace Production Co., 57337
High Island Offshore System, 3163, 3426, 18007, 52763
Highlands, N.C., Town of, et al., 21371, 26122, 29168
HNG Fossil Fuels Co., 45456
Holyoke Water Power Co. et al., 3426, 5876, 12070, 12749, 49835
Homestead, Fla., City of, et al., 25371
Howard, John G., 29175
Huber, J.M., Corp., 28237
Huffington, Roy M., Inc., 20268, 35383
Huggard, Ernest D., 24122
Hunt, E.L., estate of, 47253
Huntington, Samuel, 40283
Hurbrough, John H., et al., 20270
Hytech Energy Corp., 26108
Idaho Falls, Idaho, City of, 30098
Idaho Power Co., 10721, 21930, 25374, 40907, 40908, 45437, 46070, 48001, 49836, 52279, 56262
Illinois Power Co., 5422, 8175, 9649, 10722, 13425, 14352, 14993, 17527, 17531, 18245, 21377, 24893, 25722, 33804, 36306, 45456, 54682, 57337
IMC Exploration Co., 1125
Independent Oil & Gas Association of West Virginia, 24123, 46074, 60642
Indiana & Michigan Electric Co. et al., 1392, 1820, 2433, 3308, 3618, 7251, 9522, 9639, 12070, 14353, 17527, 19280, 21354, 24123, 24124, 32455, 33805, 43354, 46070
Indianapolis Power & Light Co., 10722, 12363, 36307
Inland Gas Co., Inc., 1822, 31212, 51704
Inter-City Minnesota Pipelines, Ltd., Inc., 1644, 43550, 59887
International Generation & Transmission Co., 7693
Interstate Drilling, Inc., 10722, 49353
Interstate Energy Co., 14353, 29979
Interstate Power Co., 7691, 8017, 21354, 24577, 37742, 53801
Iowa Electric Light & Power Co., 31966, 36307
Iowa Illinois Gas & Electric Co., 9639
Iowa Power & Light Co., 2433, 4095, 8288, 17865, 30870, 43550, 49042, 50961, 51704, 54683, 57644, 58414, 60199
Iowa Public Service Co., 1119, 1393, 3163, 3741, 9522, 17528, 18742, 19281, 30102, 52279
Iowa Southern Utilities Co., 19438, 25374, 26108, 37483, 46070, 56094, 56262
Iowa-Illinois Gas & Electric Co., 15357, 24731, 43354
J & J Enterprises, Inc., et al., 10722, 18743
Jackson Purchase Electric Cooperative Corp. et al., 10723, 24577, 35987
Jacobs, Charles D., 9523
Jacobs, Jerrold L., 24124
Jersey Central Power & Light Co., 8288, 31213
Johnson, Richard L., 8023
Jones-O'Brien, Inc., et al., 19275, 29182
Juarez Gas Co., S.A., et al., 37742, 41259, 57645
Kamlok, Inc., 45457, 54287
Kansas City Power & Light Co., 7359, 9524, 10724, 11596, 20047, 21377, 28238, 46572
Kansas Gas & Electric Co., 5042, 9524, 14718, 19438, 24732, 25375, 25723, 26781, 38896, 43354, 49043, 58415
Kansas Power & Light Co., 4455, 5877, 7358, 24125, 27587, 29980, 30104, 35988, 37483, 38896, 42780, 48001, 49043, 49836, 59119
Kansas-Nebraska Natural Gas Co., Inc., 5877, 7693, 14353, 17528, 19276, 19438, 51704, 53801, 57952
Kaskaskia Gas Co., et al., 45437
Kauffman, John T., 14353
Kennebec River Pulp & Paper Co., Inc., 14353
Kentucky Gas Storage Co., 19913
Kentucky Utilities Co., 998, 12927, 23637, 25714, 29175, 35989, 35991, 43354, 47246
Kentucky West Virginia Gas Co., 7359, 21361, 28238, 30870, 32180, 34193, 36997, 48002, 59887
Kerr-McGee Refining Corp. et al., 45438
Ketchikan Public Utilities, 7353
Kings River Conservation District, 23638
Kokomo Gas & Fuel Co., 60199
Laclede Gas Co., 48002
Lacy, R., Inc., 31966
Ladd Petroleum Corp., 3164, 60642
Lake Superior District Power Co., 36308
Lakehead Pipe Line Co., Inc., 13425
Lara, Jean, et al., 1393
Larkin, Frederick G., Jr., 25375
Lawrence. C.F., & Assoc., Inc., 57644
Lawrence Hydroelectric Associates, 3164, 26781, 56094
Lawrenceburg Gas Transmission Corp. et al., 7360, 8836, 11253, 11597, 12928, 18007, 30870, 37997, 47259, 49836, 60199, 60200
Leach Brothers, Inc., 7694, 12749
Leede Exploration, 9524
Lehigh Portland Cement Co. et al., 6835, 18008, 27588
Lesky, Stephen, 25375
Lewis, M.H., 26790
Lewis, Owen H., 46071
Liberty Oil & Gas Corp., 45457, 52764
Lincoln Electric Cooperative Inc., 54288
Lockhart Power Co., 21361, 39416, 57338
Logue & Patterson, 52764
Lone Star Gas Co. et al., 4880, 18745, 56095, 56096, 56262, 57338, 59901
Lone Star Gathering Co., 57338
Louisiana Power & Light Co., 17866, 34194, 48002, 50962, 51837, 57339
Louisiana-Nevada Transit Co. et al., 6835, 33802, 35528, 43355, 59887
Loveland, Colo., City of, 8015
Lunday-Thagard Oil Co., 50962, 51837
Lyndonville, Vt., Village of, Electric Department, 29169
MAPCO Inc., 47259
Madigan, John B., 32457
Madison, Maine, Town of, Electric Works Department, 38904
Madison Gas & Electric Co., 12928
Maguire Oil Co., 24125
Maher, Joseph R., 27587
Maine Hydro-Electric Development Corp., 37484, 41259
Maine Public Service Co., 12070
Malden, Missouri, City of, 13423
Maloney, Gerald P., 31213
Marathon Oil Co. et al., 11255, 51127
Marietta, Tex., City of, et al., 4880
Marine Contractors & Supply, Inc., 3928
Marshall Exploration, Inc., 6645
Martinsville, Va., City of, 38905
Massachusetts Electric Co., 43355
May Petroleum Inc., 39417
McClendon, Jack. R., 24124
McCulloch Interstate Gas Co. et al., 45439, 53802
McCulloch Interstate Gas Corp., 32457
McCulloch Oil & Gas Corp., 16385, 53806
McFarlane Oil Co., Inc., 50495
McGalliard & Sparks, Inc., 23638, 30871
McGinley, John R., Jr., 43355
McKelvy Oil Co., 24732, 45439
McMoran Exploration Co., 37213
McNeer, Charles S., 7355
Mesa Petroleum Co. et al., 3308, 25464, 34833, 34834
Messman Rinehart Corp., 45457
Metcalfe, Miss., Town of, et al., 30110
Metropolitan Edison Co., 56262
Metropolitan Sanitary District of Greater Chicago, 43356, 47254
Meyer, Martin R., 24125
Michigan Consolidated Gas Co., 8582, 11256, 12928, 18008, 22236, 29182, 31213, 35529
Michigan Gas Storage Co., 14990
Michigan Power Co., 2207, 14355, 36507, 40283
Michigan Wisconsin Pipe Line Co. et al., 2214, 2434, 3165, 4096, 4102, 8017, 9645, 12070, 12750, 16220, 16385, 16538, 17529, 18246, 19438, 21378, 23011, 23638, 24733, 25714, 27588, 30872, 31214, 31967, 32181, 34194, 36508, 36998, 37742, 37743, 45914, 47254, 49043, 50495, 51705, 54288, 54985, 54986, 57953, 59888, 60642, 60992
Mid Louisiana Gas Co. et al., 3166, 9640, 12071, 29183, 35093, 39418, 46074, 55817, 60200
Mid-Continent Area Power Pool, 16386
Mid-Continent Gas Storage Co. et al., 24125, 47259
Midwest Natural Gas Corp. et al., 7353
Midwestern Gas Transmission Co., 1394, 14997, 16539, 20272, 22237, 27588, 30872, 31214, 35383, 39418, 40294, 49837, 58115, 58415, 59888, 60200, 60992
Miller, James J., 31968
Minnesota Power & Light Co., 26774, 30105, 35530, 47254, 57954, 58415
Mississippi Power Co., 3166
Mississippi Power & Light Co., 2435, 4455, 5423, 8018, 8288, 13425, 14355, 15357, 40908, 46572, 50496
Mississippi River Transmission Corp., 4100, 4103, 9336, 10724, 17529, 21930, 21931, 26108, 26123, 26781, 31215, 32325, 32326, 34834, 36308, 38463, 43356, 52764, 58415, 60201
Missouri Edison Co., 2215, 14997
Missouri Power & Light Co., 24578, 27589, 37744, 50496, 57339, 59119
Missouri Public Service Co., 58416

Missouri Utilities Co., 11597, 19439, 50498
Mitchell Energy Corp., 25465
Mobil Oil Corp. et al., 9340, 20047, 30106, 31968, 35992, 56263
Mobil Pipe Line Co. et al., 30091
Modesto-Turlock Irrigation Districts et al., 29183
Moncrief, W.A., 37005
Monongahela Power Co. et al., 31215, 32326, 36998, 37214
Montana Light & Power Co., 30872, 58417
Montana Power Co., 3166, 5417, 7360, 7361, 11256, 12751, 16387, 31215, 31975, 35530, 36309, 39419, 40294, 46573, 46575, 48002, 48003, 49837, 49838, 52280
Montana-Dakota Utilities Co., 1394, 9524, 10724, 20047, 25376, 25723, 26109, 29607, 37744, 38896, 39418, 50962, 53807, 58856, 60201, 60993
Montaup Electric Co., 3167, 7251, 19913, 24126, 30107, 34533, 43356, 48004, 53807, 59120
Monterey County Flood Control and Water Conservation District, Calif., 45457
Morgan, Charles F., 24120
Morgas, 31968
Mosinee Paper Corp., 12072, 13426, 24895
Mountain Fuel Resources, Inc., et al., 8835, 16539, 17532, 21378, 26774, 27590, 28242, 30108, 43357, 43551, 48003, 55817, 59888, 59889
Mountain Fuel Supply Co., 4103, 9646, 12072, 16387, 19277, 19914, 20547, 26775, 26782, 26785, 30872, 37484, 39419, 40278, 40295, 47255, 49838, 56096, 57955, 59120, 59891
MRT Exploration Co. et al., 24578
Mt. Carmel Public Utility Co., 8288, 9649
Mueller, Joseph P., 9525, 45914, 47254, 57337
Mullins & Prichard, 30109, 36508
Municipal Electric Utilities Association of New York State et al., 25376
Murphy Oil Corp. et al., 1822
Nagel, Theodore J., 27591
Nantahala Power & Light Co., 43552, 48004
National Exploration Co., 43357
National Fuel Gas Supply Corp. et al., 11253, 11255, 16540, 20047, 20547, 24733, 24895, 25376, 26475, 26775, 31969, 33805, 38897, 39419, 41081, 47247, 51838, 55818, 58417, 60646
Natomas North America, Inc., 8835
Natural Gas Pipeline Co. of America et al., 1395, 2216, 2435, 2757, 3167, 5424, 6835, 7251, 7252, 7253, 8018, 8019, 8020, 12072, 13426, 16540, 18009, 20038, 20048, 21378, 21502, 25376, 25377, 26109, 29183, 30102, 30873, 30874, 31215, 31216, 34195, 34531, 35094, 35530, 35992, 36999, 38456, 38900, 40285, 40296, 40307, 43357, 45915, 46070, 46074, 46075, 47255, 47256, 49045, 49839, 50032, 53807, 54683, 57645, 57646, 59120, 59891
Nebraska Public Power District, 33954
Neleh Gas & Oil Corp. et al, 37215
Nevada Power Co. et al., 1528, 5417, 5877, 11597, 13617, 36309, 37485, 58857
New Bedford Gas & Edison Light Co., 1651, 16387, 23638, 29176, 31976, 37744, 37745, 39851, 47248, 48004, 57647, 59424
New England Power Co. et al., 1384, 3169, 7253, 8839, 19281, 23639, 31217, 34195, 43358, 46071, 54288, 56263, 56264, 58417, 59121, 60647
New England Power Pool, 21379, 24578, 36510, 43358, 43359, 50033
New York Power Pool, 3427, 9341, 24579
New York State Electric & Gas Corp., 19281, 35531, 38897, 47248, 47256, 49045
Newton, John T., 26790, 50495
Niagara Mohawk Power Corp., 15357, 19077, 25723, 29165, 50498, 57339, 57647, 60647
Noll, Herman B., 31230
North Counties Hydro-Electric Co., 11254
North Penn Gas Co., 7695, 11255, 12935, 21362, 23012, 25716, 26111, 28242, 29166, 33802, 36511, 37000, 43359, 50033, 51838, 53808, 57340, 58620, 60201
Northern Illinois Gas Co., 24580
Northern Indiana Public Service Co., 12364, 16220, 25716, 26782, 35531, 56264
Northern Natural Gas Co. et al., 1119, 1531, 1645, 2216, 3168, 3428, 4104, 4881, 6310, 7695, 8022, 9526, 9640, 9647, 11597, 14355, 14990, 16222, 16387, 18010, 19277, 19281, 19283, 21361, 23639, 24581, 26782, 26783, 28242, 28541, 29165, 31969, 31976, 33802, 33811, 33954, 34195, 34196, 34835, 36138, 36511, 38457, 38901, 38902, 39420, 40279, 40307, 40909, 41081, 41260, 43359, 45438, 45461, 48005, 49046, 50962, 51838, 52044, 58620, 59424, 59902, 60202, 60993
Northern Pump Co., 12929, 31969, 50034
Northern States Power Co., 1125, 2757, 4880, 4881, 5417, 7696, 12364, 16388, 16805, 17530, 17532, 18010, 20858, 23012, 23639, 24582, 24733, 25378, 25715, 27591, 30109, 31977, 33954, 33955, 34196, 40296, 42780, 48004, 53808, 56267
Northville Dock Pipe Line Corp. et al., 1397, 9647, 19283, 21362
Northwest Alaskan Pipeline Co., 16805, 26111, 57957
Northwest Pipeline Corp. et al., 1397, 1646, 1647, 4100, 4104, 4881, 7361, 7696, 8022, 8289, 8835, 8836, 9527, 9649, 9650, 10435, 12073, 12364, 12929, 13426, 14998, 15185, 15482, 16388, 16541, 17533, 18011, 19277, 19278, 19439, 21362, 21363, 25715, 26115, 29166, 29167, 31217, 33955, 34196, 35094, 35531, 36310, 36512, 37000, 38900, 38905, 39419, 45458, 47249, 47250, 47261, 50962, 54684, 56267, 56268, 57956, 58417, 59892, 60202
Northwestern Public Service Co., 6311, 17531, 18011, 24127, 37485, 38457, 43360, 47256
ONG Exploration, Inc., et al., 28545
Oakdale Irrigation District and South San Joaquin Irrigation District, 59121
Oglethorpe Electric Membership Corp. et al., 46071
Ohio Edison Co., 1824, 33956, 37745, 49839, 50499, 57340
Ohio Power Co. et al., 2435, 3932, 12365, 18012, 24582, 25726, 42780, 54684, 56268, 57647, 60647
Oil & Gas Futures, Inc. of Texas, et al., 6313, 23639
Oil Reports & Gas Service, Inc., 37215
Oklahoma Gas & Electric Co., 5046, 6312, 6836, 15357, 15358, 16388, 27592, 28243, 29608, 31977, 34525, 49839, 49840, 58418
Oklahoma Natural Gas Co., 50035
Oklahoma Natural Gas Gathering Corp., 20038, 26475, 57340, 57959, 60203
Orange & Rockland Utilities Inc. et al., 17534, 57341
Oroville-Wyandotte Irrigation District, 11597
Otter Tail Power Co., 16389, 19283, 21364, 53809
Outline Oil Corp., 5412
Ozark Gas Transmission System, 48006
PDC Gas Co., 37215
Pacific Alaska LNG Co. et al., 2216, 12930, 21364
Pacific Gas & Electric Co. et al., 1648, 1826, 2435, 3170, 3618, 4455, 6836, 6837, 9528, 12930, 21502, 21931, 25716, 44884, 53809, 58418
Pacific Gas Transmission Co. et al., 6837, 16806, 57959, 59122, 60203
Pacific Interstate Transmission Co. et al., 31218, 38897, 43361, 46574, 57961, 59892
Pacific Power & Light Co. et al., 1648, 1651, 2208, 2436, 12365, 12930, 14356, 15358, 21365, 24583, 29168, 31977, 38897, 38906, 40302, 49840, 51838, 53809, 54986, 58418
Pactex Pipeline Co., 40297
Pan Eastern Exploration Co., 60203
Pan Eastern Production Co., 27593
Panhandle Eastern Pipe Line Co. et al, 1826, 7253, 9647, 13427, 16541, 16542, 21365, 21366, 24734, 25378, 27592, 28243, 31230, 32458, 34197, 35095, 37001, 38902, 38906, 41261, 42781, 43360, 43552, 45458, 45459, 45460, 51705, 51706, 53810, 54684, 56268, 56269, 57341, 58419, 59425, 59892, 59893, 60204, 60647, 60994
Papago Tribal Utility Authority et al., 40303
Parent, Brian A., 24119
Pawnee, Ill., Village of, et al., 45461
Pearson, Robert H., 32458
Penn Yan, N. Y., Village of, 26478, 30335
Pennsylvania Electric Co. et al., 1399, 11598, 30109, 33957, 46566, 58420
Pennsylvania Power Co., 25465
Pennsylvania Power & Light Co., 5417, 6838, 17866, 26115, 26476, 26783, 30110, 31219
Pennsylvania-New Jersey-Maryland Interconnection, 7254, 8290, 8840
Pennzoil Co., 18012, 23641, 31219
Pennzoil Louisiana & Texas Offshore Co., Inc., et al., 3428, 24127, 25378, 26116, 31231
Pennzoil Oil & Gas, Inc., et al., 31220
Peoples Natural Gas, 60205
Perkins, A.E., 21347, 52276
Perry Gas Transmission, Inc., 31219
Perryton, Tex., City of, et al., 1120, 45913
Petroleum, Inc., 60206
Philadelphia Electric Co. et al., 2436, 3309, 7362, 15358, 15359, 25380, 25716, 29980, 38457, 60206

Phillips Petroleum Co., 3932, 31221, 33806, 53810, 57648
Phillips Pipe Line Co., 30093
Piedmont Natural Gas Co. et al., 54986
Pogo Producing Co. et al., 2757
Portland, Oreg., City of, 6832, 18741
Potomac Edison Co., 3171, 30874, 32326, 49046, 52764, 56269
Potomac Electric Power Co., 5878, 30110, 32181
Powder River Pipeline Corp. et al., 7362, 11598, 45461
Power Authority of State of New York, 16542, 36138, 47261, 52280
Powers, John W., 31231
Premier Resources, Ltd., 57962
Producer and pipeline respondents, 36505
Public Service Co. of Colorado, 33957, 46075, 47262, 48006, 48007
Public Service Co. of Indiana, 3171, 7254, 9640, 15359, 19441, 19914, 21367, 26476, 26775, 30874, 31222, 31977, 36311, 36512, 36513, 39851, 40285, 47257, 52765, 55818
Public Service Co. of New Hampshire, 15359, 21367, 24584, 26117, 31222, 31969, 33812
Public Service Co. of New Mexico, 21367, 21368, 21931, 21934, 26476, 29609, 29981, 36311, 39420, 45462, 60206
Public Service Co. of Oklahoma et al., 998, 2757, 5878, 6313, 6839, 11256, 11599, 14357, 17866, 25380, 35532, 35992, 40279, 43361, 50036
Public Service Electric & Gas Co., 2436, 49640
Public Utility District No. 1 of Chelan County, Wash., 23641, 24897, 26474, 31221
Public Utility District No. 1 of Klickitat County, Wash., 16806, 34197, 38464
Public Utility District No. 1 of Lewis County, Wash., 16389, 29184
Public Utility District No. 1 of Snohomish County, Wash., et al., 1399
Public Utility District No. 2 of Grant County, Wash., 36311
Puerto Rico Water Resources Authority, 52765
Puget Sound Power & Light Co., 25380, 26477, 51838, 53810
RMNG Gathering Co., 15483, 37216, 60995
Raton Natural Gas Co., 16389, 23642, 43362, 45463, 46076, 60207
Reading & Bates Petroleum Co., 37746, 38458
Redding, Calif., City of, 11599, 26779, 27593
Reeve, John P., 7353
Reeves Brothers, Inc., 42781
Remmel, Jerry G., 7358
Rensselaer, Ind., City of, 45433
Reuss, Robert P., 12365
RIC-Delta 1973 Limited Partnership, 14991
Ricci, Nicholas A., 7353
Robinson, Leslie and Veronica, 2434
Rocky Mountain Natural Gas Co., Inc., 29184
Rosett, Jesse Franklin, 36308
Sabine Production Co., 37002
Sabine River Authority of Texas et al., 55449, 56272
Sacramento Municipal Utility District, 1400
Safe Harbor Water Power Corp., 25380, 48007
Samson Resources Co. et al., 9647
San Diego Gas & Electric Co., 2436, 6312, 14999, 17532
Sandlin Oil Corp., 37002, 60650
Schlachter, David A., 9528, 45435
Schrader, Lynwood, 26790
Sea Robin Pipeline Co. et al., 2217, 7255, 9641, 17534, 18013, 21368, 23642, 24735, 27594, 29982, 30876, 30877, 31223, 31224, 33802, 34198, 35993, 37002, 45463, 48007, 52765, 56097, 60208
Sears, Herbert W., 60642
Seattle, City of, Wash., 41078
Seifried, Dean B., 25381
Seminole Electric Cooperative, Inc., et al., 23642, 26783, 29176, 30877, 45915
Shaw, Robert W., 56097
Shell Oil Co., 8841, 56272, 57341
Shenandoah Gas Co., 20048
Shield, Fred W., 60196
Sidwell Oil & Gas Co., Inc., 43363, 56273
Sierra Pacific Power Co., 1827, 24585, 35532, 59122
Sinclair Oil Corp., 16390, 45916
Sitka, Alaska, city and borough, 9638
Slack, Richard C., et al., 18012, 33957
Smith, Carl E., 7689, 46898
Smith, Earl T. & Associates, Inc., 25460
Smith, H. Russell, 25381
Smith, James F., 25381
Sohio Natural Resources Co. et al., 25864, 31430
South Carolina Electric & Gas Co., 1125, 15359, 31970, 39422
South Carolina Public Service Authority, 46076
South Georgia Natural Gas Co., 16390, 25718, 26477, 26786, 33959, 43362
South States Oil & Gas Co., 37002
South Texas Natural Gas Gathering Co. et al., 13615, 21369, 24727, 28244, 38907, 49047, 52766, 60208
South West Gas Corp., 42784
Southern California Edison Co., 2437, 10725, 11599, 12366, 29982, 32458, 36312, 39851, 39852, 39853, 43362, 50499, 52280, 52767, 57342, 57963, 59122
Southern California LNG Terminal Co., 60995
Southern Company Services, Inc., 1529, 5047, 20038
Southern Energy Co. et al., 3428, 7255
Southern Indiana Gas & Electric Co., 33959, 40307
Southern Natural Gas Co. et al., 3171, 3743, 3933, 4882, 5418, 5424, 6313, 8290, 8842, 9641, 9652, 10725, 12366, 12931, 12932, 13914, 14357, 14358, 14999, 16542, 16543, 19278, 19284, 20275, 21932, 23643, 24735, 25717, 26477, 27594, 29612, 30878, 31224, 31978, 33807, 33812, 33959, 35532, 35993, 36312, 36513, 38907, 38908, 45463, 47257, 47263, 48008, 49841, 50499, 52280, 53811, 54288, 56098, 57342, 57963, 58420, 58422, 58423, 59895, 60650
Southern Union Exploration Co., 57342
Southern Union Supply Co. et al., 4105, 29613
Southland Royalty Co., 9651, 34198, 34836, 43736, 52766
Southside Electric Cooperative, 42782
Southwest Gas Corp., 11257, 13427, 18013, 19279, 21369, 26120, 40279, 40287, 45916, 46076, 58423
Southwestern Electric Power Co., 53811, 58424, 60208, 60651
Southwestern Public Service Co., 30110
Springville, N.Y., Village of, 34201
St. Regis Paper Co., 7256
Standard Pacific Gas Line Inc., 2209
Sterling Production Co., 54987
Stern, Peter M., 27593
Stingray Pipeline Co., 2218, 31224, 47251
Stone, J.G., et al., 36313
Suerte Oil Co. et al., 18746
Sun Oil Co., 15360, 16390, 18014, 23643, 23644, 24128, 26121, 31225, 37003, 40280, 41081, 46574, 47263, 48008, 53811, 54987, 56098, 57648, 60209
Superior Oil Co., 58116
Superior Water, Light & Power Co., 2210, 35994, 40303
Supron Energy Corp., 3424, 32458
Susquehanna Power Co. et al., 52767
Sutton Producing Corp., 37003
Switzer, Donald C., 27586
T.E.L. Oil & Gas Corp., 31971, 37217, 45464
TXO Gathering Co., 37004
Tacoma, Wash., City of, 1118
Tampa Electric Co. et al., 12932, 25381, 25382, 38909, 50038
Taylor, R. Clark, 12931
Tenneco Exploration, Ltd., et al., 17530, 26784
Tenneco Inc. et al., 2218, 9652, 28244, 32326, 35994, 51707
Tenneco LNG, Inc., 21369
Tenneco Oil Co. et al., 13428, 33807
Tennessee Gas Pipeline Co. et al., 1649, 2218, 2219, 3172, 4104, 4883, 5418, 5419, 5420, 7257, 7353, 7363, 8023, 9528, 9641, 12073, 12933, 13428, 13429, 13618, 13619, 14719, 14991, 15483, 15484, 16544, 19446, 20049, 21370, 22238, 24128, 24729, 24901, 25718, 26121, 26478, 26786, 27595, 28244, 28245, 29185, 29983, 29984, 30878, 30879, 31225, 33813, 34202, 34526, 34527, 35533, 36513, 37486, 38909, 40280, 40281, 40287, 41262, 43363, 43552, 45464, 45465, 45466, 45917, 46072, 46567, 47263, 49047, 50963, 56098, 56273, 56274, 57963, 58424, 59896, 60209, 60996
Tennessee Gas Transmission Co. et al., 3744
Tennessee Natural Gas Lines, Inc., 19914, 21370, 25382, 26784, 30879, 31971, 45465, 51839, 60211
Texaco Inc. et al., 2438, 7348, 31971, 54289, 60996
Texaco-Cities Service Pipe Line Co. et al., 30092
Texas Eastern Transmission Corp. et al., 1400, 1401, 1531, 2219, 3933, 4456, 4883, 6839, 7257, 7354, 7363, 7691, 8024, 8179, 8843, 11600, 13431, 13619, 15000, 16544, 17866, 18014, 21371, 21503, 21934, 23644, 28246, 30879, 31226, 32459, 34199, 35384, 36313, 36319, 36320, 40307, 41082, 43364, 45466, 46569, 46571, 46574, 47257, 48009, 49048, 50963, 51839, 52767, 54685, 56099, 57965, 58424, 59123, 59896, 60211
Texas Energies, Inc., et al., 3309, 29349
Texas Gas Exploration Corp. et al., 2220
Texas Gas Pipe Line Corp., 26775, 60212, 60651

Texas Gas Transmission Corp. et al., 4097, 4884, 7257, 7697, 10726, 11601, 14358, 14992, 18014, 19915, 20275, 20548, 21934, 24730, 24898, 24899, 25467, 26121, 28246, 31971, 33807, 34198, 34199, 34527, 34529, 35994, 38910, 39422, 41262, 43363, 43545, 45467, 49841, 51839, 51840, 57964, 58425, 58857, 60212
Texas Gulf Coast area rate proceeding et al., 46072
Texas Oil & Gas Corp., 50038
Texas Pacific Oil Co., Inc., 34836
Texas Power & Light Co., 1532, 11601, 13615
Texas Sea Rim Pipeline, Inc., 59897
Texasgulf Inc., 25467
Texoma Pipe Line Co., 37746
Thermalito Irrigation District et al., 2221
Tipperary Oil & Gas Corp., 47264
Torrance, Walter F., Jr., 27598
Trailblazer Pipeline Co. et al., 57966
Trans-Alaska Pipeline System, 3744, 11601, 21371, 30111, 45467
Transco Exploration Co., 42783
Transcontinental Gas Pipe Line Co., 19284
Transcontinental Gas Pipe Line Corp. et al., 2211, 2221, 3310, 3429, 4098, 4099, 4885, 5421, 6314, 7697, 8024, 10726, 11601, 12074, 12368, 13431, 13619, 13620, 15360, 16807, 17867, 18015, 19915, 21932, 22238, 23645, 23646, 24128, 24129, 24900, 25382, 25719, 25724, 26786, 28247, 28248, 30334, 30879, 30880, 30881, 31226, 31227, 31228, 31972, 32460, 33813, 33814, 34200, 34531, 35994, 36138, 36320, 36321, 37003, 37487, 37747, 37748, 38458, 38459, 38460, 39422, 40288, 40304, 41083, 41084, 41263, 43364, 45467, 45468, 45469, 45918, 46072, 47257, 47264, 48009, 49842, 49843, 50033, 50038, 50499, 50964, 51841, 52281, 53812, 54686, 54988, 56275, 57967, 58425, 58620, 59123, 59124, 59897, 60997
Transport, Inc., 19441
Transwestern Pipeline Co. et al., 2660, 10436, 11257, 14359, 15361, 16544, 31228, 31973, 33815, 41084, 46575, 53813, 54988, 57342, 59898
Tri-State Gas Co., 48010
Tri-State Gas Transmission Co., 40282
Trunkline Gas Co. et al., 1827, 2222, 7258, 8291, 9642, 12074, 13620, 16544, 23647, 26776, 27595, 27596, 27597, 30111, 30880, 30882, 31229, 32460, 39422, 39423, 43365, 45469, 47251, 53813, 57343, 58426
Tucson Gas & Electric Co., 3173, 8290, 17532, 19288, 21373, 23012, 33960, 49844, 60212, 60651
Turlock & Modesto Irrigation Districts, 1828
U-T Offshore System, 13434, 14359, 18015, 50039
Ukiah, City of, Calif., 26478
Union Electric Co., 6314, 8291, 10727, 12075, 15361, 17530, 18016, 21373, 21934, 27597, 30111, 33960, 33961, 38461, 48010, 50500, 52281
Union Light, Heat & Power Co. et al., 1401, 36321, 45917, 51707, 53814
Union Oil Co. of California et al., 26122, 26791, 29352, 36505, 51707, 60213
United Gas Pipe Line Co. et al., 1402, 1649, 2438, 3619, 4105, 4106, 4886, 7258, 7698, 11602, 12368, 13434, 14992, 15485, 16390, 16545, 17867, 18016, 19279, 19288, 19442, 20049, 21373, 21374, 22239, 24586, 24901, 25382, 25719, 25720, 26784, 27597, 29614, 29984, 30112, 30936, 31973, 31974, 32461, 33960, 34201, 34836, 35095, 35096, 36321, 37004, 38462, 40288, 40308, 41084, 41264, 43546, 43552, 43553, 45918, 48010, 48011, 50035, 51841, 52768, 53814, 55818, 57343, 57648, 60213, 60997
Upper Peninsula Generating Co., 18016, 25383, 57343
Upper Peninsula Power Co., 3620, 17867, 39853, 57966
Utah Gas Service Co., 9528
Utah Power & Light Co. et al., 1402, 4106, 7698, 15361, 18747, 20050, 29985, 29986, 30103, 31229, 33816, 37005, 42783, 49844, 54686, 54989
Valley Gas Transmission, Inc., 24901, 25724, 36322, 59898, 60214
Vanceburg Electric Light, Heat & Power System et al., 56099, 56100
Veeser, William L., 12367
Vermont Electric Cooperative, Inc., 8181, 11257, 12075, 18017, 26776, 26791
Vermont Electric Power Co., Inc., 18017, 29169, 51842
Vidalia, Town of, La., 47251
Vigilante Electric Cooperative, Inc., 8291
Virginia Electric & Power Co., 2438, 3746, 12751, 23647, 29169, 34202, 35995, 37488, 40298, 52282, 52768, 58426
Warhanek, Howard L., 7355
Washington Natural Gas Co., 27598
Washington Water Power Co., 9652, 12751, 20050, 42292, 43365, 49844, 54689, 57966, 58427
West Penn Power Co., 2222, 29185, 29986, 33803
West Texas Gathering Co., 17043, 20050, 38464, 48012
West Texas Utilities Co., 7259
Western Gas Interstate Co., 1125, 10436, 10727, 15362, 43546, 50964, 50965, 53814, 53815, 59899, 60214
Western Massachusetts Electric Co. et al., 9642, 17531
Western Oil Producers, Inc., 9652
Western Transmission Corp., 10437, 19289, 21504, 29169, 31230, 41085, 48011, 49845, 53815, 58427, 60214
Whitley, Michael R., 43545
Wilson, Charles B., Jr., Ltd., 43541, 60192
Windsor, Vermont, Town of, 58428
Wisconsin Electric Power Co. et al., 3173, 11258, 36322, 40305, 45470, 48012, 50500
Wisconsin Gas Co., 34202
Wisconsin Power & Light Co., 1650, 4099, 7698, 12934, 14359, 30112, 31978, 32326, 32327, 33961, 39854, 41842
Wisconsin Public Service Corp., 1403, 24588, 29986, 33960, 35096, 38910, 43547, 48012, 58428
Wisconsin River Power Co., 6840, 15363, 53815
Wisconsin Valley Improvement Co., 21936
Wiwi, Robert P., 31230
Woods, Herbert S., & Associates, 18742, 49352
Woods Exploration & Producing Co. et al., 3310, 36322, 56275
Yadkin, Inc., 8178, 38912
Yankee Atomic Electric Co. et al., 3746
Yeadon, Fred W., Jr., 24122
York Haven Power Co., 59125
Young Refining Corp., 38463, 47265, 51707
Yucca Petroleum Co. et al., 12935
Zimmer, William H., Jr., 29185, 35995

## FEDERAL GRAIN INSPECTION SERVICE

**RULES**
Grain standards:
Fees for inspection and weighing services; Canada, 16307

**PROPOSED RULES**
Grain standards:
Draft regulations, advance notice, 33612, 36641

**NOTICES**
Export grain; weighing and supervision of weighing, 49027
Export seed grain; weighing requirements, 11838, 15345
Grain standards; inspection points:
Alabama, 25157
California, 21707
Delaware, 50952
Florida, 30085
Idaho, 17847, 20828, 35362, 48670, 52272
Illinois, 11727
Indiana, 13082, 25157
Iowa, 30849, 32842, 54668
Kansas, 6641, 9513, 22428
Maryland, 9513
Minnesota, 21707
Mississippi, 26090
Nebraska, 27218
Ohio, 5399, 34827, 57629, 58847
Oregon, 11728
Pennsylvania, 4079
South Carolina, 30085
Texas, 27574, 34513, 36495, 36664, 41418, 57312
Utah, 17847, 20828, 35362, 52272
Virginia, 30085
Washington, 29340
Wisconsin, 11591, 21707
Grain standards; permissive grain inspection criteria, protein testing, 13406
Meetings:
Grain Standards Act Advisory Committee, 9176, 28844, 36988, 46557, 49342
Recordkeeping and registration requirements, 4446, 6115

## FEDERAL HIGHWAY ADMINISTRATION

**RULES**
Civil rights:
Construction contracts; reporting requirements for equal opportunity employment, 19386
Engineering and traffic operations:
Bridges, structures, and hydraulics; special bridge replacement program, 35031
Certification acceptance, 1330, 46964
Construction and maintenance; Buy America requirements, 53717
Design standards, highway, 14648

Design standards; 1978 Uniform Traffic Control Devices Manual, 27787
Emergency relief funds; procedures, 59483
Highway design standards, 56660
Maximum speed limit, National; maximum vehicle size and weight, 59464
National defense highways, 43712
Pavement design policy, 35030
Pedestrian facilities and bikeways, 17814
Preconstruction procedures; disposal of existing highway bridges, cost participation; rescinded, 1491
Preconstruction procedures; Federal-aid programs approval and authorization, 34461
Preconstruction procedures; plans, specifications and estimates, 58564
Preconstruction procedures; traffic safety in highway and street work zones, 47140, 58368
Railroad-highway insurance protection; coverage amount, 22177
Secondary road plan, 1332
Traffic operations improvement programs; procedures simplification, 58564
Highway safety:
Pavement marking demonstration program, 18668
Highway safety programs, State; uniform standards:
Comprehensive plans, State; filing requirements, 9144
Motor carrier safety regulations:
Agents, special; functions, etc., 20011
Driving distance guidelines, maximum, 55 mph compliance; policy statement, 7622
Hours of service; driver's daily log and multi-day log, extension of use, 29295, 50438, 52246
Out-of-service driver sticker; elimination of requirement, 22360
Parts and accessories; lamps, semitrailer and full trailer rear sidemarker; location, 38831, 44534
Physical requirements for drivers in interstate and foreign commerce; applications for waivers, 56900
Practice rules; service of responses to claims, 19047
National Highway Institute:
Education and training programs; fellowship and scholarship grants, 3558
Education and training programs; State and local highway department employees, 35477
Organization and authority delegations:
Physical requirements for drivers in interstate and foreign commerce; applications for waivers, 56900
Payment procedures:
Funds, advance right of way revolving, 5514
Funds, advancement; partial rescission, 16167
Incentive payments; advertising control on interstate system, 42742
Reimbursement; construction engineering costs, 57873
Reimbursement; partial rescission, 16167
Reimbursement; railroad work, 27518
Reimbursement vouchers, 57873
Planning:
Federal-aid highway systems; technical amendments, 38384
Property acquired by States for modified or terminated highway projects, use and disposition, 54077
Program management and coordination; Federal and federally assisted programs and projects, 15626
Public transportation:
Mass transit and special use highway projects; correction, 15321
Nonurbanized areas; Federal financial assistance, 58308
Right-of-way and environment:
Environmental impact and related statements, 20979
Highway traffic and construction noise abatement procedures; level prediction methods, 45838
Landscape and roadside development; information centers and systems, 19390
Real property acquisition reports, annual, 38818
State highway agencies; recordkeeping requirements for Federal-aid highway records, 41387

**PROPOSED RULES**

Engineering and traffic operations:
Bridges, structures, and hydraulic design; flood plains, encroachments, 60298
Construction and maintenance; contract procedures, 36645
Design standards, highway; geometric; resurfacing, restoration, and rehabilitation projects; withdrawal, 2734
Design standards, highway; geometric design standards, 37556, 40539, 48658
Engineering services; engagement of consultants, 51040
Railroad-highway grade crossings; traffic control systems; advance notice, 35491
Vehicle size and weight enforcement certification; inquiry, 2634
Highway safety improvement program, 14683
Motor carrier safety regulations:
Apprenticeship program for drivers under 21; withdrawn, 20
Employee safety and health standards, 8566, 21338
Hours of service; driver's logs, 100-mile exemption; extension of time, 21
Hours of service; limitations for commercial vehicle drivers, 21905, 38608
Hours of service; 4-day and 7-day log forms; withdrawn, 20
Motor vehicle driving; toxic gases in truck cabs, 20, 1809
Parts and accessories; air brake system, commercial vehicles, 9626, 25156
Parts and accessories; clearance and identification lamps, withdrawn, 60626
Parts and accessories; commercial vehicles; step, handhold and deck requirements, 6637, 21337
Parts and accessories; front tire marking requirements, 46555
Parts and accessories; minimum cab space dimensions; inquiry, 6274
Parts and accessories; nonmetalic tanks; fire resistance test; withdrawn, 3598
Parts and accessories for safe operations; coordination with motor vehicle safety standards, 9166
Truck cabs, heavy duty; ambient temperature; inquiry, 5397
Payment procedures:
Negotiated contracts administration, 51040
State contract administration for other than competitively bid contracts; CFR Part proposed removal, 51040
Planning:
Highway planning and research contracts, 51040
Major urban transportation investment policy and procedures, 57478
Property acquired by States for modified or terminated highway projects; use and disposition, 35008
Regulation review; proceeding terminated, 10578
Right-of-way and environment:
Highway traffic and construction noise, abatement procedures; advance notice, 57161

**NOTICES**

Bridge tolls, etc.:
Bayonne Bridge et al., 50529
Delaware River Port Authority, 18618, 28877
New York and New Jersey Port Authority, 46617
Construction zone safety, meeting, 49600
Highway projects, delayed or halted; adverse social and economic effects, inquiry, 47039, 58243
Highway safety:
Highway fatality counting rule, 45486
Meetings:
Construction zone safety, 49600
Uniform Traffic Control Devices National Advisory Committee, 2967, 22797, 60364
Traffic control devices; inquiry, 14561, 48753
Vehicle sizes and weights certification; non-conformity determinations; various States, 6350

## FEDERAL HOME LOAN BANK BOARD

**RULES**

Community reinvestment, 47153
Conduct standards; correction, 1786
Federal home loan bank system:
Automatic transfer accounts; maximum rate of return payable, 57593
Bank members, liquidity requirement reduction, 18163
Flood disaster protection; certain loan exemptions; members of banks, 5358
Liquidity requirement of members; reduction, 58802
Nondiscrimination requirements; redlining, etc.; policy statement, 22332
NOW accounts; eligibility in New York, 53415
Rate of return limitations; certificate accounts, maturities; distribution, 27984
Rate of return limitations; new certificate accounts, 21439, 24271
Simplification of regulations, 46836
Federal Savings and Loan Insurance Corporation:
Application procedures; community reinvestment, 47162
Benefit plans, trusteed personnel; insurance coverage, 10548
Felony charge; procedures and standards for suspensions and prohibitions, 10546

IRA and Keogh accounts; insurance coverage increase, 53415
Loans in excess of 80 percent of value, two family dwellings; operations, 17467
Mortgage insurance; operations, 60572
NOW accounts; eligibility in New York; operations, 53415
Premerger notification compliance, 35262
Principal supervisory agent; definition, 7203
State housing coporations investments; policy statement, 20224
Tax and loan depositories; saving and loan participation; operations and definitions, 43448
Federal savings and loan system:
Application procedures; community reinvestment, 47160
Certificate accounts; new categories; operations, 24272
Corporate title change, 10545
Electronic fund transfers through remote service units; operations, 9790, 22930
Felony charge; procedures and standards for suspensions and prohibitions, 10546
Loans, servicing, 35261
Loans in excess of 80 percent of value, two family dwellings; operations and definitions, 17465
Mortgage instruments, alternate; variable rate, graduated payment, and reverse-annuity, 59338
Mortgage-futures transactions, 54622
NOW accounts; eligibility in New York; operations, 53415
Premerger notification compliance, 35262
Principal supervisory agent; definition; operations, 7203
Savings and loan holding companies:
Acquisitions; community reinvestment, 47162
Premerger notification compliance, 35262

**PROPOSED RULES**

Community investment, 29918
Community reinvestment; geographic proximity and military personnel, 57259
Federal home loan bank system:
Banks members; liquidity and investment, 17479
Nondiscrimination; handicapped in Federally assisted programs, 16190
Nondiscrimination requirements; furnishing applicants with property appraisal for rejected applications, 22374
Payments to third parties, 52254
Rate of return limitations; certificate accounts, maturities; distribution, 20237
Simplification of regulations, 14505
Tax and loan depositories; savings and loan participation, 17831
Federal Savings and Loan Insurance Corporation:
Conversions from mutual to stock form of ownership; participation by account holders, concentration held by officers, etc., 48956
Fidelity bond requirements for insured institutions; operations and policy statement, 36107
Forward commitments to purchase securities, 55413
Liquidity and investment; operations, 17479
Loans, private mortgage insurance; operations, 17833
Real property transactions with affiliated persons, restrictions; operations, 50444
Stock option and stock purchase plans, 54663
Tax and loan depositories; savings and loan participation; operations and definitions, 17831
Federal savings and loan system:
Alternative mortgage instruments, 33254
Deletion of rules with limited applicability, 30730
Electronic fund transfers through remote service units, 5010, 7327
Federal stock associations; authorization of mergers and consolidations, 53762
Investment in Inter-American Savings and Loan Bank; operations, 23727
Payments to third parties, 52254
Stock option and stock purchase plans, 54663
Tax and loan depositories; savings and loan participation; operations, 17831
Financial institutions; credit needs of local communities, assessment; hearing, 3370, 7243, 13074
Savings and loan holding companies:
Forms and procedures; inquiry, 54942

**NOTICES**

Accounting bulletins; audits, 8295
Advisory committee review; inquiry:
Federal Savings and Loan Advisory Council, 14360
Applications, etc.:
Beneficial Corp. et al., 49365
Bryan Building & Loan Association, 1543
Entex, Inc., 25868
First Federal Savings & Loan Association of Okeechobee County, 22242, 48715
First Federal Savings & Loan Association of Suffolk, 25383
Great American Insurance Co., 6840
HFG Stockholding, Inc., 7476
Highfield Financial Group (U.S.A.) Ltd., 47009
Home Insurance Co., 2937
Kaneb Services, Inc., et al., 48015
Matagorda County Savings Association Group, 2758
Modern Savings & Loan Association, 37489
NLT Corp. et al., 37217, 43767
Ohio Savings Financial Corp., 3313
Overland Park Financial Corp., 52518
Pan American Federal Savings & Loan Association, 53495
Pat Griffin Co., 13629
Southern California Savings & Loan Association, 27606
State Management, Inc., 23652
Statewide Financial Corp., 5436
Sunwood Corp., 16407
Transwestern United Corp., 16407
Tropical Savings Investors, Inc., 20553
TSA Financial Corp., 26615
United Savings & Loan Association of Los Alamos, 37217
Washington Federal Savings & Loan Association, 22242
Western Financial Corp., 16407
Western & Southern Life Insurance Co., 42305
Chartering authority for mutual savings banks; inquiry and hearings, 60999
Equal credit opportunity and fair housing; enforcement guidelines, 29256
Meetings:
Federal Savings and Loan Advisory Council, 12754, 26480, 47283
Meetings; Sunshine Act, 1431, 2046, 2274, 3010, 3472, 3792, 4176, 4914, 5645, 6195, 7294, 7519, 8922, 12812, 14598, 15553, 16645, 17627, 18628, 19986, 21105, 21791, 24169, 25406, 26183, 27281, 28894, 29409, 29887, 30390, 30645, 31305, 32026, 32925, 34574, 35431, 35789, 37832, 39215, 40101, 40995, 41159, 41334, 43409, 44966, 46156, 46417, 49107, 49603, 50124, 50282, 52358, 52601, 53896, 55310, 56337, 57718, 58896, 58897
Privacy Act; systems of records; annual publication, 35792

## FEDERAL HOME LOAN MORTGAGE CORPORATION

**RULES**

Securities, issuance in book entry form, 52457

**PROPOSED RULES**

Securities, issuance in book-entry form, 32428

**NOTICES**

Meetings; Sunshine Act, 3340, 3341, 3472, 7393, 7394, 20086, 21105, 23844, 31304, 33873, 38166, 39637, 41466, 49107, 55311, 59244
Privacy Act; systems of records; annual publication, 56342

## FEDERAL HOUSING COMMISSIONER—OFFICE OF ASSISTANT SECRETARY FOR HOUSING

**RULES**

Carpet with foam rubber cushion (flowed-on); standards, 31004
College housing:
Loan program for 1978 FY, 25784
Waiver of provisions, 26709
Insulation, loose fill, pneumatically installed in wall cavities; minimum property standards requirements, 59838
Minimum property standards; editorial corrections, 13511
Minimum property standards, one-and two-family, multifamily, and care-type housing, 9475
Minimum property standards handbook; one and two-family dwellings, multifamily dwellings and care-type housing, 18670
Mobile home construction and safety standards:
Storage near heat producing appliances, prevention, 35265
Welding procedures, 19846, 25965
Mortgage and loan insurance programs:
Coinsurance; hazard insurance reimbursement; reasonable rate limit, 33907
Coinsurance; late charges, 60153
Condominium ownership; late charges, 60153
Experimental housing; editorial corrections, 13511
Home ownership and project rehabilitation; downpayment requirements and maximum subsidy payments, 9273
Home ownership and project rehabilitation; recovery of assistance, etc., 60156
Interest rates, maximum, 8798, 13870, 23713, 29113, 38384
Interest subsidy grants; deadline extension, 45557

Low cost and moderate income; public bodies, cooperatives, etc.; eligibility, 39570
Multifamily housing; debenture interest rates reduction, 13870
Multifamily housing; eligibility of mortgages on existing projects, 6217
Multifamily housing; eligibility requirements, 43023
Multifamily housing; late charges, 60154
Mutual mortgage and insured home improvement; late charges, 60152
Mutual mortgage insurance; editorial corrections, 13511
Mutual mortgage insurance; hazard insurance reimbursement; reasonable rate limit, 33906
Mutual mortgage insurance; interest fees charge date, 19846
Nursing homes and intermediate care facilities; late charges, 60154
Property improvement and mobile home loans; late charges, 60150
Property improvement and mobile home loans; loan amount and term increases, Alaska, 26429
Property improvement and mobile home loans; maturity period increase, 60151
Property improvement and mobile home loans; refinancing, 50173
Property improvement and mobile home loans; used mobile home financing, 7315
Rental projects; mortgage insurance and interest reduction payments; tax and utility subsidy program, 23567
State housing finance agencies; late charges, 60154
Urban renewal and insured improvement loans; debenture interest rates reduction, 13870
Urban renewal and insured improvement loans; late charges, 60154

PROPOSED RULES

Carpet cushions, detached; standards, 4065
Mortgage and loan insurance programs:
Coinsurance; late charges, 16513
Coinsurance for private mortgage lenders; eligibility requirements, contract rights and obligations, 43676
Coinsurance for State housing finance agencies; eligibility requirements, contract rights, and obligations, 61222
Condominium ownership; late charges, 16513
Federal income tax returns; release on request to Secretary, 38417
Home ownership and project rehabilitation; elimination of substantially rehabilitated properties, 17834
Low cost and moderate income; tax exemption obligations, 30498
Multifamily housing; late charges, 16514
Mutual mortgage and insured home improvement; late charges, 16513
Nursing homes and intermediate care facilities; late charges, 16514
Property improvement and mobile home loans; late charges, 16513
Property improvement and mobile home loans; maturity increase for double-wide mobile homes, 59849
Property improvement and mobile home loans; maturity period increase, 25349
Property improvement and mobile home loans; refinancing, 22058
Property improvement and mobile home loans; smoke detection devices, 39592
State housing finance agencies; late charges, 16514
Urban renewal and insured improvement loans; late charges, 16514
Rehabilitation housing:
Delinquent loan repayment applicable to interest and principal, 60301
Rent control, local; preemption determinations, unsubsidized projects, 32104

NOTICES

Areawide housing opportunity plans, approved; special allocations; acceptance of requests, etc., 2370
Building products certification programs procedures; administrator qualifications, 33888
Fire safety requirements, plastic plumbing fixtures, 18034
Rental public housing program, annual contributions contract; inquiry, 54070
Structural Engineering Bulletin (SEB), purpose and effect, 12386
Thermal insulation:
Foamed urea-based; standards, 15367
Spray applied cellulosic; standards, 43566

## FEDERAL INSURANCE ADMINISTRATION

RULES

Crime Insurance Program, Federal:
Insurance purchases and claims adjustment; citizens of Virgin Islands, eligibility, 50428
Insurance purchases and claims adjustment; coverage or limits changes, 4008
Insurance purchases and claims adjustment; North Carolina eligibility, 16337
Insurance purchases and claims adjustment; Puerto Rico eligibility, 27187
Program description; Safety Management Institute added as servicing company, 27186
Program description; Virgin Islands, servicing company, designation, 50428
Protective device requirements; condition of coverage, 4008
Definitions, program description, etc., 7140
Flood elevation determinations:
Alabama, 16326, 16327, 16469, 16470, 22676, 23714, 31891, 39352, 47201, 47202
Alaska, 22677
Arizona, 16328, 22678, 26300, 28180, 28460, 31891, 47203
Arkansas, 6218, 6581, 22679, 26435, 47203, 47204
California, 2062, 2063, 3262, 6218, 11194, 16471, 22189, 22190, 22191, 22680, 22681, 22682, 22683, 22684, 22685, 23714, 23715, 26709, 26710, 28181, 31892, 31893, 31894, 35270, 35272, 35273, 39352, 39761, 39762, 45558, 45559, 46970, 51616
Colorado, 2063, 2065, 3262, 3266, 6219, 6220, 6581, 11488, 16471, 16472, 22191, 22192, 22687, 22688, 22689, 22690, 26301, 26433, 26711, 27788, 31894, 35270, 35275, 39353, 39354, 39355, 39762, 39763
Connecticut, 2065, 3262, 3267, 3268, 6220, 6221, 6582, 16328, 16472, 22193, 22194, 22691, 26431, 26432, 28181, 31894, 35267, 45559, 47204
Delaware, 6583, 11489, 16473, 22195, 27526, 35275, 39355, 46970
Florida, 2066, 2067, 2068, 3262, 6584, 16329, 16473, 16474, 22196, 22197, 22692, 24520, 26429, 26432, 26711, 26712, 28182, 31895, 31896, 39356, 45560, 45561, 46970, 47205, 51618
Georgia, 2069, 6222, 6584, 6585, 22197, 22693, 22694, 26430, 26441, 26712, 26713, 26714, 39356, 45561
Hawaii, 31896
Idaho, 3269, 11489, 22011, 47206
Illinois, 6585, 6586, 6602, 16329, 22010, 22012, 22013, 22020, 22021, 22198, 22199, 22200, 22695, 22696, 24297, 24298, 24522, 26301, 26302, 27522, 35271, 35273, 39357, 39763, 39764, 45562, 47207, 51618
Indiana, 6223, 11194, 16475, 22014, 22015, 45563
Iowa, 2069, 2070, 6586, 16330, 22015, 22022
Kansas, 6223, 11194, 11490, 16330, 16331, 16475, 22016, 22017, 22023, 22024, 22025, 22026, 24298, 24299, 26302, 26435, 26714, 31890, 31898, 31899, 39765, 45563, 51619
Kentucky, 6224, 6587, 6588, 16331, 16332, 16476, 22018, 22027, 31901, 35274, 47208
Louisiana, 2071, 6224, 6225, 6589, 11491, 16333, 16476, 22019, 26436, 26437, 27520, 27529, 28460, 47208
Maine, 2072, 3265, 6226, 22019, 47208
Maryland, 2073, 5807, 16333, 22020, 26303, 39765
Massachusetts, 2074, 2075, 2076, 5808, 10966, 11194, 11492, 22027, 22028, 22189, 22697, 23715, 23716, 24050, 26303, 26715, 27521, 28182, 45564, 45565, 47210
Michigan, 2076, 2077, 2078, 2079, 5809, 5810, 6589, 6590, 6591, 11492, 11493, 16334, 16477, 22028, 22029, 22698, 23717, 26304, 26715, 27519, 27527, 28461, 31902, 31903, 35276, 39358, 45565, 47211
Minnesota, 2079, 2080, 6591, 16450, 22346, 22347, 22348, 22349, 22350, 22699, 22700, 23718, 24297, 24299, 24300, 24522, 26304, 28461, 45566
Mississippi, 2080, 5810, 5811, 6592, 16335, 22350, 22701, 26305, 27523, 31904, 39359, 39766, 41204
Missouri, 2081, 2082, 2286, 2287, 3262, 5811, 5812, 5813, 11493, 11494, 15165, 16335, 16450, 16451, 22351, 22352, 22353, 22702, 22703, 22704, 22705, 22706, 22946, 22957, 24050, 24521, 26306, 28462, 28463, 31903, 31910, 35278, 39359, 45567
Nebraska, 16336, 22354, 22961, 26306, 26307
New Hampshire, 5813, 5814, 5815, 16452, 24301, 27524, 31911, 39360, 39361
New Jersey, 2287, 2288, 3262, 5815, 6592, 6593, 11194, 16336, 16452, 16459, 16460, 22200, 22355, 22939, 22950, 22969, 24049, 24050, 26307, 26716, 27524, 39577, 39767, 45568, 51619, 51620, 51621
New Mexico, 16453, 22201, 27529
New York, 2288, 2289, 2290, 2291, 5815, 5816, 6080, 6083, 6087, 11494, 16453, 16454, 16460, 16461, 16462, 16463, 16464, 16465, 16466, 22201, 22202,

22940, 22949, 22953, 22957, 22961, 24301, 24302, 24303, 24304, 24305, 24521, 26308, 26309, 26716, 26717, 28183, 28184, 28463, 28464, 28465, 31904, 31905, 35274, 39576, 39578, 39581, 39767, 39768, 45568, 45569, 51386, 51620
North Carolina, 2291, 2292, 6076, 6085, 6088, 6089, 6593, 6594, 6595, 11495, 16454, 16456, 16467, 22203, 22204, 22955, 22962, 24049, 24306, 26290, 26291, 35268, 39768
North Dakota, 6596, 22962, 27788, 46970
Ohio, 2292, 16456, 16457, 16458, 16459, 16467, 22204, 22205, 22206, 22207, 22945, 22946, 22955, 23719, 24050, 24307, 24308, 24526, 26293, 26294, 26717, 31906, 35278, 39582, 39769, 39770, 39771, 45569, 51622, 51623
Oklahoma, 24052, 26718, 39983, 51624
Oregon, 2293, 6086, 6596, 11496, 16468, 16725, 22208, 24051, 24052, 24289, 26294, 27181, 39984, 45570, 45571, 45572, 45573, 45574, 45575, 51624
Pennsylvania, 2294, 3262, 6075, 6077, 6078, 6079, 6083, 6084, 6597, 11194, 16715, 16716, 16725, 16726, 16727, 16728, 22178, 22179, 22180, 22181, 22182, 22183, 22184, 22209, 24050, 24053, 24054, 24055, 24056, 24057, 24058, 24059, 24060, 24061, 24289, 24290, 24291, 24520, 24525, 26295, 26296, 26297, 26298, 26299, 27182, 27183, 27518, 31907, 31908, 39573, 39984, 39985, 39986, 44866, 45575, 45576, 51625, 51626
Puerto Rico, 27525
Rhode Island, 16717, 22956, 24050
South Carolina, 3262, 6076, 6078, 22184, 22958, 22963, 24523, 39986, 46970
South Dakota, 6080, 16729, 24292, 27519, 35269, 39577
Tennessee, 3263, 6081, 6597, 22942, 24292, 51626
Texas, 2295, 3263, 6598, 10966, 11194, 16717, 16718, 16730, 22943, 22951, 22958, 22959, 22968, 23720, 24049, 24293, 26300, 27183, 27184, 27530, 35277, 39579, 45576, 45577, 45578
Utah, 22185, 22186, 26440, 39580, 45579, 45580
Vermont, 2295, 2296, 3264, 3265, 6088, 6090, 11497, 16730, 22948, 22963, 22964, 24527, 25720, 27525, 27527, 27530, 31908, 39575, 39987
Virginia, 2297, 3263, 6077, 6084, 6598, 6599, 10907, 10908, 16718, 16719, 16720, 16721, 16722, 16723, 16724, 16731, 16732, 16733, 16734, 22186, 22187, 22188, 22943, 22947. 22952, 22956, 22959, 22960, 22964, 22966, 22967, 23721, 24293, 24294, 24296, 24523, 26431, 26437, 26438, 26439, 27184, 28184, 31909, 35271, 35277, 39580, 39987, 44866, 45580, 45581, 51627, 51628
Washington, 6599, 16316, 16317, 16318, 16319, 16320, 16724, 22968, 26434, 26440, 27185, 39581, 39582, 51628
West Virginia, 2297, 2298, 6087, 16321, 16322, 16323, 26441, 31902, 31910
Wisconsin, 2298, 2299, 3263, 3264, 6082, 6600, 6601, 6602, 11498, 16323, 16324, 16715, 16725, 22706, 22940, 22941, 22949, 22952, 22954, 23721, 23722, 24049, 27186, 27522, 27528, 35269, 39574
Wyoming, 2300, 3263, 10906, 11488, 16325, 16326, 22177, 22944, 24296, 27521, 28466, 39578
Flood insurance; communities eligible for sale:
Alabama, 3260, 11184, 16313, 24012, 26288, 27788, 27987, 33239, 36904, 41029, 41031, 42743, 46967, 46968
Arizona, 16314, 27987, 36904
Arkansas, 27788, 36902, 41967, 46969
California, 12676, 16314, 24014, 26285, 27788, 36066, 36903, 41029, 41031, 46848, 46967, 46968, 46970, 51014, 51616
Colorado, 3091, 3260, 5805, 24014, 26285, 26288, 27987, 32751, 36066, 36903, 36904, 38689, 41029, 42743, 46967, 46968
Connecticut, 11182, 11184, 16313, 16314, 18671, 24012, 24014, 26285, 26288, 27788, 27987, 33239, 36902, 36903, 36904, 38690, 42743, 46848, 46967
Delaware, 5805, 24012, 24014, 26288, 32751, 33239, 36066, 38689, 41031, 42743, 46967, 46968
Florida, 3261, 5805, 11182, 16313, 24012, 24014, 26285, 26288, 27788, 27987, 32751, 33239, 36066, 36904, 41029, 41031, 41967, 42743, 46967, 46968, 47725
Georgia, 3091, 5805, 11182, 12676, 16313, 16314, 18671, 24012, 24014, 27788, 36904, 38690, 41029, 51014
Idaho, 16313, 24012, 24014, 26288, 36902, 41029, 46967, 46968
Illinois, 5805, 11182, 16313, 16314, 24012, 24014, 26285, 26288, 27788, 28671, 36902, 36903, 36904, 41029, 42743, 46848, 46967, 46969, 47725, 51014, 51616
Indiana, 3260, 18671, 26288, 27788, 33239, 41031, 46967
Iowa, 3260, 3261, 11182, 11184, 12676, 16314, 24012, 24014, 26285, 26288, 27788, 32751, 36903, 38689, 42743, 46967, 46968, 46969
Kansas, 3091, 3260, 11182, 24014, 27788, 27987, 32751, 33239, 36066, 36902, 36904, 38689, 41029, 41031, 41967, 42743, 46967, 46969, 46970, 47725, 50875, 51014, 51616
Kentucky, 3260, 12676, 16314, 24014, 26288, 27788, 27987, 32751, 33239, 36904, 41031, 46967
Louisiana, 11182, 12676, 16314, 24012, 24014, 26285, 26288, 27788, 32571, 36066, 36902, 36903, 38689, 41029, 41967, 46967, 46969, 47725
Maine, 16314, 18671, 24012, 24014, 26285, 26288, 27788, 36902, 36903, 41029, 46968, 46970
Maryland, 3261, 11182, 16313, 16314, 18671, 24012, 24014, 26288, 27788, 32751, 36067, 36902, 38689, 46967, 46969, 47725
Massachusetts, 3261, 11182, 18671, 24014, 26285, 27788, 32751, 33239, 36067, 36903, 38690, 41029, 41031, 42743, 46849, 51014, 51616
Michigan, 3091, 3260, 3261, 5805, 11184, 12676, 16314, 24012, 24014, 26285, 26288, 27788, 27987, 32751, 36067, 36902, 36903, 36904, 41029, 41967, 42743, 46968, 46969, 51014
Minnesota, 5805, 12676, 16313, 16314, 18671, 24012, 24014, 26288, 27788, 27987, 33239, 36067, 36904, 38690, 41029, 41031, 42743, 46969, 46970, 47725, 47726, 51014
Mississippi, 11182, 12676, 16313, 16314, 18671, 24012, 24014, 26285, 27788, 36067, 36903, 41967, 42743, 46969
Missouri, 3091, 3260, 11182, 12676, 18671, 24014, 26285, 26288, 27788, 27987, 32751, 36067, 36903, 38691, 41029, 42743, 46967, 46968, 46969, 47726, 51014
Montana, 24012, 24014
Nebraska, 3260, 3261, 5805, 11182, 11184, 12676, 16314, 18671, 24014, 27788, 36902, 41967, 42743
Nevada, 38691, 46967
New Hampshire, 3260, 24014, 26285, 27788, 28671, 33240, 36902, 36903, 41031
New Jersey, 3091, 3260, 3261, 5805, 11182, 11184, 12676, 16313, 16314, 24012, 24014, 26285, 26288, 32751, 33240, 36067, 36902, 36903, 38690, 41030, 41031, 42743, 46968, 46969, 51014
New Mexico, 11182, 16313, 24014, 46849, 46967, 51616
New York, 3260, 3261, 5805, 11182, 12676, 16314, 24012, 24014, 26285, 26288, 32752, 33240, 36067, 36903, 38690, 41030, 41031, 41967, 42743, 46849, 46968, 46969, 47726, 51014, 51616
North Carolina, 5805, 12676, 16313, 16314, 18671, 24012, 24014, 26285, 26288, 27788, 27987, 32752, 33240, 36067, 36901, 36904, 38690, 41029, 41031, 41967, 42745, 46849, 46967, 46968, 46969, 47726, 51014, 51616
North Dakota, 3260, 11184, 16314, 24012, 24014, 36904, 41029
Ohio, 3260, 3261, 5805, 11182, 11184, 12676, 16314, 24012, 24014, 27788, 33240, 36067, 36902, 38690, 41031, 42745, 42748, 46849, 46967, 46969, 46970, 47726, 51014, 51616
Oklahoma, 3260, 3261, 11184, 16314, 24012, 24014, 27788, 36901, 46967
Oregon, 3260, 3261, 5805, 11182, 12676, 16313, 16314, 18671, 24012, 24014, 26285, 26288, 27788, 32752, 36902, 36903, 38690, 41030, 42745, 46968, 47726
Pennsylvania, 3091, 3260, 3261, 5805, 11182, 11184, 12676, 16313, 16314, 18671, 24012, 24014, 26285, 27788, 27987, 32752, 33240, 36067, 36901, 36902, 36903, 36904, 38690, 41030, 41031, 41967, 42745, 46849, 46968, 46969, 46970, 47726, 51014, 51616
Rhode Island, 11184, 26285, 32752, 36067, 36093, 38690, 41030, 46969
South Carolina, 11183, 24012, 24014, 26285, 27790, 33240, 36904, 38690, 41031, 42746, 46849
South Dakota, 3261, 24012, 24014, 27788, 51616
Tennessee, 3261, 5805, 11183, 12676, 16314, 24012, 24014, 27788, 27987, 32752, 33240, 36904, 38690, 41031, 46849, 46968, 47726, 51616
Texas, 3260, 3261, 11182, 11184, 12676, 16314, 24012, 24014, 27788, 27987, 36901, 36902, 36904, 42746, 46968, 46969, 46970, 47726
Utah, 3260, 16314, 36902, 38690, 42746, 51015
Vermont, 18671, 26285, 26288, 27788, 27987, 32752, 36067, 36903, 38690, 41030, 42746, 46968, 46969, 51015
Virginia, 11182, 12676, 16314, 24012, 24014, 26288, 27788, 27987, 32752, 33240, 36068, 36902, 36904, 38690, 41030,

41031, 42746, 46849, 46968, 46969, 51015, 51616
Washington, 3091, 3260, 3261, 5805, 11182, 12676, 24014, 27987, 32752, 36904, 38690
West Virginia, 3091, 5805, 11182, 24014, 26288, 27788, 32752, 33240, 38690, 41031, 46968
Wisconsin, 5805, 12676, 24012, 26285, 26288, 27788, 27987, 33240, 36068, 36902, 36903, 36904, 38691, 41030, 41967, 42747, 46968, 46969, 51015
Wyoming, 24012, 27788, 27987, 33240, 36068, 36904, 38690, 41031, 42747, 46849, 46967, 46969, 46970
Flood insurance, communities eligible for sale; editorial changes, 7141
Flood insurance; special hazard areas:
Alabama, 3092, 6070, 11185, 16316, 24022, 24023, 27792, 36906, 38692, 38697, 41968, 41969, 41971, 50882, 50884
Alaska, 11185, 27792, 41969
American Samoa, 3092
Arizona, 3092, 6070, 11185, 24020, 24023, 27792, 38697, 50881, 50883
Arkansas, 6070, 11185, 24020, 24023, 27792, 36905, 38692, 41972
California, 3092, 6070, 11185, 24020, 24023, 27792, 36241, 36242, 36243, 36906, 38697, 39572, 41970, 41971, 50881
Colorado, 3092, 6070, 11185, 24020, 24023, 27792, 36243, 36906, 38692, 38697, 39572, 41971, 41972, 50881
Connecticut, 6070, 27792
Delaware, 6070, 24022, 38692, 39572
Florida, 3092, 6070, 11185, 24020, 24023, 27792, 36905, 39572, 41969, 41971, 50880, 50882, 50886
Georgia, 3092, 6070, 11185, 24020, 24023, 27792, 36906, 38692, 38697, 41968, 41971, 50880, 50882, 50884, 50886
Idaho, 3092, 6070, 11184, 24020, 24023, 27792, 36243, 36908, 38692, 41968
Illinois, 3092, 6070, 11185, 24020, 24023, 27792, 36241, 36242, 36244, 36905, 38697, 41968, 41970, 41971, 50882, 50884, 50886
Indiana, 3092, 6070, 11185, 24020, 24023, 27792, 36242, 36243, 36244, 38693, 38697, 41968, 41969, 41971, 50882, 50886
Iowa, 6070, 11185, 16316, 24020, 24023, 27792, 36906, 38693, 38697, 41969, 41970, 41972, 50885, 50887
Kansas, 3092, 6070, 24020, 24023, 27792, 36242, 38693, 41968, 41972, 50887
Kentucky, 3092, 6070, 24020, 24023, 27792, 36905, 38693, 38697, 41969, 41970, 41971, 50880, 50882
Louisiana, 3092, 6070, 11185, 16316, 24020, 24022, 24023, 27792, 36242, 36906, 38694, 38697, 39572, 41970
Maine, 3092, 6070, 11185, 24033, 36905, 41971
Maryland, 6070, 36905, 38697
Massachusetts, 6070, 24023, 38697, 39572, 41968
Michigan, 3092, 6070, 11185, 24020, 24023, 27792, 36242, 36906, 38694, 38697, 41968
Minnesota, 3092, 6070, 11185, 24020, 24023, 27792, 38694, 38697, 41969, 41970, 41971, 50880, 50882, 50886
Mississippi, 3092, 6070, 11185, 24023, 27792, 36905, 38694, 38697, 41969, 41970, 41971, 50882
Missouri, 3092, 6070, 11185, 24020, 24023, 27792, 36242, 36905, 38694
Montana, 3092, 6070, 11185, 24020, 24023, 27792, 36920, 38694, 38697, 50881, 50885, 50887
Nebraska, 3092, 6070, 11185, 24020, 24023, 27792, 36905, 38694, 50881
Nevada, 11185, 24023, 36906
New Hampshire, 3092, 11185, 24023, 50885
New Jersey, 3092, 6070, 11185, 16316, 24022, 24023, 27792, 36242, 36243, 36905, 38695, 39572
New Mexico, 3092, 6070, 11185, 24020, 24023, 27792, 36908, 38695, 38697, 41968, 41970
New York, 3092, 6070, 11185, 24020, 24023, 27792, 36243, 36905, 38697
North Carolina, 3092, 6070, 11185, 24020, 24022, 24023, 27792, 36907, 38697, 41968, 41969, 50880, 50882, 50886
North Dakota, 6070, 11185, 24020, 24023, 27792, 38695, 38697, 39572, 41970, 41971
Ohio, 3092, 6070, 11185, 24020, 24023, 27792, 36242, 36905, 38694, 41969, 41970, 41971, 50880, 50882, 50883, 50884, 50885, 50886
Oklahoma, 3092, 6070, 11185, 24020, 24023, 27792, 36243, 36244, 36905, 38695, 41969
Oregon, 3092, 6070, 11185, 24020, 24023, 27792, 36242, 36244, 36905, 38697, 41972, 50883
Pacific Territories, 36905
Pennsylvania, 3092, 6070, 11185, 16316, 24020, 24022, 24023, 27792, 36242, 36243, 36906, 38697, 41970
Rhode Island, 6070
South Carolina, 3092, 6070, 11185, 16316, 24023, 27792, 36907, 38695, 38697, 41969, 41970, 41972, 50880, 50883, 50885, 50886
South Dakota, 3092, 6070, 11185, 24020, 24023, 36905, 38695, 41968, 41970, 41971, 41972
Tennessee, 3092, 6070, 11185, 24020, 24023, 27792, 36907, 38695, 38697, 41968, 41969, 41972, 50880, 50883, 50886
Texas, 3092, 6070, 11185, 24020, 24023, 27792, 36243, 36244, 36906, 38695, 38697, 39572, 41968, 41972, 50881, 50887
Trust Territory of the Pacific Islands, 41968
Utah, 3092, 11186, 24020, 24023, 27792, 36905
Vermont, 3092, 6070, 11185, 24020, 24023, 27792, 38697, 50883
Virginia, 6070, 24023, 27792, 36243, 36907, 38696, 38697, 41969, 50885
Washington, 3092, 6070, 24020, 24023, 27792, 36243, 36905, 38697
West Virginia, 3092, 6070, 11185, 24023, 27792, 36243, 36905
Wisconsin, 3092, 6070, 11185, 24020, 24023, 27792, 36242, 36905, 38696, 38697, 41969, 41970, 41972, 50880
Wyoming, 6070, 24020, 24023, 27792, 36908, 38697, 41969
Flood insurance; special hazard areas, map corrections:
Alabama, 24675
Arkansas, 28185
California, 28186
Colorado, 24675, 24676, 28186, 28187, 28193, 39772
Connecticut, 16169, 24676, 24677, 28187, 28188
Delaware, 3273
Florida, 10906, 10907, 16169, 16170, 24677, 24678, 28189
Georgia, 3273, 28189
Kansas, 28190
Maryland, 3269, 35916
Michigan, 28190
Minnesota, 24678, 24679
Missouri, 24679
Nebraska, 39772
New Jersey, 3270, 16170, 24680, 24681, 28191, 35916, 35917
New York, 28191, 28192, 35917
North Carolina, 24681
North Dakota, 16171, 28192, 39773
Oklahoma, 16171, 24682, 28193, 35918, 39773
Pennsylvania, 24683
Rhode Island, 3271, 16171, 24683
South Carolina, 28193
Texas, 3272, 3273, 16172, 16173, 16174, 24684, 24685, 24686, 24687, 24688, 24689, 28194, 28195, 28196
Virginia, 24689, 24690, 24691, 28197, 28198, 39774
Wisconsin, 16174, 24691
Flood Insurance Program, National:
Insurance coverage and rates, 2570
Insurance coverage and rates; reduction of waiting period, 50427
Insurance sale and claims adjustment, 2573
Self-insurance plan, exemption of State-owned properties; Maine, Ga., Oreg., and Fla. added, 7141

**PROPOSED RULES**

Flood elevation determinations:
Alabama, 3382, 23732, 24699, 31024, 38417, 50888
Alaska, 27855, 31025
Arizona, 3382, 16746, 16747, 16748, 27855, 31025, 31026, 38724, 47564, 47565, 47566, 50462, 50463
Arkansas, 11939, 31352, 47567
California, 3372, 3373, 3383, 3384, 3385, 3386, 11940, 11941, 11942, 11943, 11944, 11945, 11946, 11947, 16749, 16750, 16754, 16755, 16756, 18700, 22390, 22391, 23732, 23733, 23734, 23735, 24699, 27197, 27856, 31027, 31028, 31353, 35491, 35492, 35493, 35494, 38418, 39129, 42018, 42261, 47567, 47568, 50462, 50889, 51412, 51413, 51414, 51415, 51416, 60600, 60601
Colorado, 3374, 3387, 3388, 3389, 3390, 5389, 11948, 11949, 11950, 16751, 16756, 18700, 18701, 18702, 27197, 27857, 31029, 35494, 35495, 38419, 38420, 38421, 39130, 39131, 42261, 42262, 43037, 47569, 49822, 50889, 50890
Connecticut, 3374, 3390, 11950, 22391, 23735, 27561, 27857, 35495, 35496, 38421, 38422, 38424, 42262, 50463, 51411
Delaware, 3374, 11952, 18702, 18703
Florida, 3375, 3376, 3377, 3391, 3392, 11952, 23735, 24699, 27198, 27199, 31030, 31031, 42264, 43038, 43039, 43040, 43041, 50891, 50892
Georgia, 3377, 3378, 3379, 3392, 11928, 16751, 16757, 27857, 31032, 38425, 50464, 50893
Hawaii, 23736
Idaho, 31033, 31034, 31035, 31354, 35497, 42264, 42265, 43041, 43042, 47569
Illinois, 3380, 3381, 3393, 11660, 11661, 11662, 11663, 11664, 11665, 11666, 11929, 11930, 16758, 16759, 18703,

23738, 23739, 23740, 24700, 31035, 31036, 31037, 31355, 31356, 35498, 35499, 35500, 38426, 39132, 42266, 42267, 43043, 43044, 47570, 47571, 60600
Indiana, 27200, 27201, 27858, 35500, 38426, 38427, 39133, 43045, 47572, 51416, 51417
Iowa, 11667, 11931, 30810, 31357, 38427, 38428, 50464, 50465, 50466, 50894, 51417, 60602
Kansas, 3394, 3395, 11660, 11668, 11669, 11670, 11788, 11932, 11933, 16760, 18704, 22392, 23740, 23741, 24548, 24700, 26033, 27202, 30811, 31164, 35501, 38713, 39133, 42268, 43046, 43047, 43048, 43475, 47572, 50208, 50467
Kentucky, 11788, 16760, 23741, 23742, 30812, 47573
Louisiana, 27859, 30812, 30813, 47573, 50895
Maine, 3396, 38714, 38715, 42268, 42269, 42276
Maryland, 11789, 23743, 42270, 42271, 50467, 50468, 60603
Massachusetts, 2735, 3396, 3397, 11789, 11935, 16761, 18704, 18705, 22393, 24548, 24549, 24550, 31357, 35502, 38716, 38717, 38718, 39134, 39135, 41237, 42271, 42272, 47574, 50470, 50471, 50472, 51418, 51419, 51420
Michigan, 3398, 3399, 3400, 16751, 18705, 18706, 18707, 23595, 24701, 30814, 31358, 31359, 31360, 35060, 35061, 35062, 38719, 38720, 42273, 43317, 43318, 47740, 50198, 50199, 50200, 50201, 50469, 50895
Minnesota, 3593, 11790, 11791, 11936, 11937, 24702, 27859, 30815, 30816, 31360, 31361, 38720, 38721, 43319, 43320, 43321, 43327, 47546, 47547, 47740, 50202, 3575-3577
Mississippi, 3594, 11791, 27860, 30816, 31362, 43322, 43323, 50203, 51420, 51648, 60603
Missouri, 3577, 3578, 11792, 11793, 11794, 11938, 11939, 16763, 18708, 23596, 23597, 24550, 24702, 27202, 27203, 30817, 35063, 35064, 35065, 38721, 43324, 47548, 47549, 47550, 50204, 50205, 50206, 50207
Montana, 12204, 31362, 31363, 35065, 39135
Nebraska, 3579, 11794, 12205, 16772, 38722, 47741, 50207, 50209, 50210, 50701
Nevada, 24703
New Hampshire, 3580, 18563, 18708, 18709, 23597, 24551, 24552, 27204, 30818, 31364, 35066, 38722, 38723, 38724, 38858, 38859, 38860, 38861, 42273, 42274, 42275, 44550, 50896, 50897
New Jersey, 11795, 12205, 12206, 16752, 16763, 24704, 24705, 27205, 31365, 31366, 31367, 31954, 35067, 38862, 39136, 39137, 42275, 42276, 42277, 43325, 47550, 47551, 47741, 50701, 50898, 51421, 51422, 60604
New Mexico, 11795
New York, 3581, 11499, 11500, 11501, 11502, 11503, 11796, 11797, 12207, 12208, 16764, 16765, 16766, 18564, 22393, 22394, 23598, 23599, 23600, 23601, 24706, 24707, 27206, 30819, 30820, 30821, 35068, 38862, 42278, 47551, 47552, 50702, 50898, 50899, 51423
North Carolina, 3582, 11504, 12209, 16767, 22394, 23602, 51424
North Dakota, 3583, 27861, 27862, 42278, 42279, 47552, 47742
Ohio, 3583, 3584, 11505, 11506, 11507, 12209, 12210, 12211, 12212, 16752, 16767, 22395, 23603, 23604, 23605, 23606, 24553, 24707, 27862, 27863, 30810, 35069, 38862, 42279, 42280, 42281, 43326, 47743, 47744, 47745, 50702, 50899, 51425, 60605
Oklahoma, 30809, 50900
Oregon, 6099, 11508, 11509, 12212, 12213, 22400, 24553, 24554, 24555, 24556, 24557, 27562, 27563, 27863, 38863, 39138, 45383, 45384, 45385, 50900
Pennsylvania, 3584, 6099, 6100, 6101, 6102, 6104, 6105, 6106, 6107, 6108, 6109, 6110, 12193, 12194, 12195, 12196, 12197, 12198, 12199, 12214, 12215, 16767, 16768, 18565, 22395, 22396, 22401, 22402, 22403, 27564, 27565, 27566, 30822, 36478, 36479, 36480, 38863, 38864, 38865, 45386, 45387, 45388, 45389, 45390, 47553, 47554, 47555, 47556, 47557, 47558, 47559, 47560, 47745, 47746, 47747, 47748, 47749, 47750, 50703, 50704, 50705, 50706, 50707, 50708, 50709, 50710, 50711, 50901, 50902, 51426, 60606, 60607, 60608, 60609, 60610
Rhode Island, 39138, 47750
South Carolina, 3585, 6245, 18565, 24708, 60610
South Dakota, 50455
Tennessee, 6246, 22397, 24557, 36481
Texas, 6247, 6248, 12200, 16769, 18566, 18567, 22397, 22403, 24558, 27864, 30823, 30824, 30825, 31367, 31368, 31369, 36481, 36482, 38866, 38867, 38868, 39139, 45391, 47751, 50456, 51427, 60611
Utah, 3586, 12200, 12201, 24558, 24708, 24709, 24710, 38594, 50456
Vermont, 3586, 3587, 16769, 22398, 22399, 22404, 38595, 38596, 45391, 47752, 50457
Virginia, 3588, 3589, 3590, 3591, 3592, 6249, 6250, 6252, 6253, 6254, 6255, 6256, 11928, 12201, 12202, 12203, 16770, 18568, 22405, 22406, 22408, 22409, 38596, 38598, 39140, 45394, 47561, 49822, 50457, 50458, 50902
Washington, 3593, 6257, 6258, 12192, 16753, 16754, 18569, 22399, 30826, 31369, 31370, 36483, 36484, 38597, 39141, 45392, 45393, 45394, 47562, 50459, 60612
West Virginia, 16771, 22409, 24070, 27565, 38597, 45395, 45396, 45397, 47562, 47753
Wisconsin, 6259, 18569, 22410, 31370, 36485, 45397, 50460, 50461, 50903, 60600
Wyoming, 6260, 30827, 38429, 45398, 47563

**NOTICES**

Flood insurance:
Communities with special hazard areas, subject to prohibition of Federal assistance; list, 18268, 48021
Mandatory purchase of flood insurance; guidelines, 7142, 11862
Riot or civil disorder losses; reinsurance, 39298

## FEDERAL LABOR RELATIONS COUNCIL

**NOTICES**

Privacy Act; sytems of records; annual publication, 39937

## FEDERAL MARITIME COMMISSION

**RULES**

Financial reports by carriers in domestic offshore trade:
Reporting requirements, 40524
Interpretations and policy statements:
Collective bargaining agreements; exemption; interim statement, 25821
Self-policing requirements exemption; obligation on pending actions, 60471
Licensing of independent ocean freight forwarders:
Reporting requirements, 40524
Surety bond amount increase, 32777
Military rates; change in reporting period, 22982
Oil or hazardous substances pollution cleanup; financial responsibility, 35709, 39102
Practice and procedure:
Document filing in proceedings, requests for enlargement of time, 56897
Exceptions, appeals, and review; filing time, 33722
Freight charges in foreign commerce; applications for permission to refund or waive portions, 38580, 41040
Petitions for reconsideration; allowance of replies; effective date clarified, 11992
Rulemaking proceedings, conduct of, 19395
Subpenas and discovery requests; service and legal representation; appeals, etc., 19665
Time limit for Commission review in absence of exceptions or appeal, 50431
Security for protection of public; GAO clearance extension for reporting requirements, 60471
Self-policing systems, 7319, 18178, 22041, 25343, 28496, 42760, 46972, 60471
Shipping conditions, unfavorable, in foreign trade of U.S.; Guatemala:
Favored carriers; equalization fee refund, 3563
Favored carriers list, certain deletions, 3362
Suspension of rule, 3361

**PROPOSED RULES**

Collective bargaining agreements; exemption; advance notice, 17845, 24559
Financial reports by carriers in domestic offshore trades:
Interest capitalization during construction, 12345, 20026
Just and reasonable rate of return or profit determination guidelines; advance notice, 53046
Rate base average value computation, 26081
Licensing of independent ocean freight forwarders; bids on government shipments at U.S. ports, 58098
Oil pollution cleanup financial responsibility; oil and hazardous substances discharges, 16772, 21337
Overcharge claims; time limit for filing, 39399, 44555
Practice and procedure:
Declaratory order petitions, 56921
Freight charges in foreign commerce; permission to refund or waive; applications, 18572, 24080
Proceedings; prompt adjudication, etc., 54960

Reports by common carriers by water in domestic offshore trades; financial and operating data, availability; withdrawn, 11590
Shipping in foreign trade of U.S., actions to adjust or meet unfavorable conditions; Ecuador, 44554
Shipping in U.S. Atlantic and Gulf/European trades; actions to adjust or meet unfavorable conditions, 60966

NOTICES

Agreements filed, etc., 35, 1004, 1406, 1544, 1990, 2443, 3313, 3314, 3761, 4111, 4314, 5064, 5065, 5572, 6321, 7266, 8033, 8297, 8850, 9204, 10440, 10733, 11602, 11756, 11855, 12085, 12754, 13918, 15010, 15011, 15189, 15190, 16224, 16407, 16547, 17048, 17401, 17538, 18034, 18251, 18612, 19078, 19921, 20277, 20554, 20865, 20866, 21518, 22072, 22074, 22779, 23014, 23015, 24593, 25384, 26481, 27606, 27607, 28044, 28251, 28855, 29030, 29626, 29829, 30620, 30891, 32329, 32330, 32331, 33321, 34842, 36140, 37011, 37217, 37218, 38470, 38622, 38936, 39174, 39425, 40545, 40546, 41270, 41436, 42040, 43386, 43767, 45640, 45641, 45919, 46906, 47010, 47284, 47613, 49562, 49563, 50505, 51142, 51724, 52519, 52771, 53819, 54138, 54139, 55283, 55463, 56938, 57183, 57184, 57971, 58627, 58628, 59133, 59433, 59904, 61000
Casualty and nonperformance, certificates:
Carnival Cruise Lines, Inc., et al., 32461
Chandris Inc., 4111
Compagnie Generale Maritime, 16549
Companhia de Navegacao Lloyd Brasilleiro, 32332
Compania de Vapores Cerulea S.A. et al., 4887
Compania de Vapores Realma S.A. et al., 42305
Costa Armatori S. A., 22443
Delian Atemis Cruises, Inc., et al., 2758
Delta Steamship Lines, Inc., 25385
Dominion Navigation Co., Ltd., 58230
Hellenic Co. Overseas Cruise Vessels S.A., 26482
Italia Crociere Internazionali S.P.A. et al., 38471, 58627
Kommandittselskapet Royal Viking Sea, 2758
Malone & Hyde, Inc., 59904
Montauk Oil Transportation Corp. et al., 60226
Nouvelle Compagnie de Paquebots, 20278
Phaidon Navegacion S.A., 52771, 52772
Venture Cruise Lines, Inc., 20278, 28252
Xanadu Cruises, Inc., 58230
Collective bargaining agreements; exemption, 36690, 36691, 40316
Complaints filed:
A/S D/S Svendborg et al. v. Maryland Port Administration, 23013
Adel International Development, Inc. v. Puerto Rico Maritime Shipping Authority and Star Lines, Inc., 15011
Allied Chemical, S.A., v. Farrell Lines, Inc., 47010
Allied Chemical International Corp. v. Farrell Lines, Inc., 51447, 55463
Allied Chemical International Corp. v. Pacific America Container Express, 51447
Celanese Corp. v. Prudential Steamship Co., 19921
Circle Industries Corp. v. Northeast Marine Terminal Co., Inc., 16549
Clark, John T., & Son of Maryland, Inc. v. Maryland Port Administration, 23015
Du Pont de Nemours, E.I. & Co., v. Seatrain Lines, Inc., 16549
Emile Bernat & Sons Co. v. United States Lines, Inc., et al., 57186
I.T.O. Corp. of Baltimore v. Maryland Port Administration, 23015
International Trade & Development Inc. et al. v. Sentinel Line and Anchor Shipping Corp., 31987
Kuehne & Nagel, Inc. v. VAASA Line, 9859
Lyon, Rene D. Co., Inc. v. American President Lines, Ltd., 47788
Merck Sharp & Dohme International v. Kawasaki Kisen Kaisha, Ltd., 29627
Old Ben Coal Co. v. Sea-Land Service, Inc., 19079
Organic Chemicals (Glidden-Durkee) Div. of SCM Corp. v. Atlanttrafik Express Service, 4314
Pacific Freight Audit, Inc. v. American President Lines, Ltd., 27606
Pacific Freight Audit, Inc. v. Sea-Land Service, Inc., 27607
Pierpoint Management Co. et al. v. Holt Hauling & Warehousing System, Inc., 53058
Port of Portland v. Pacific Westbound Conference, 41271
Puerto Rico Maritime Shipping Authority v. Sea-Land Service, Inc., 59134
Saipan Shipping Co., Inc. v. Island Navigation Co., Ltd., et al., 3623
Salen Shipping Agencies, Inc. v. Pacific Maritime Association, 49564
SCM Chemicals v. Farrell Lines, Inc., 8034
Seatrain Gitmo, Inc. et al. v. Puerto Rico Maritime Shipping Authority et al., 35547
Standard Fruit and Steamship Co., Inc., et al. v. Pacific Maritime Association, 49564
Union Carbide Corp. v. Japan Lines (U.S.A.) Ltd., 22443
United States Lines, Inc. v. Maryland Port Administration, 22780
Energy and environmental statements, availability, etc.:
Combi Line joint service agreement et al., 59134
Euro-Pacific Joint Service Agreement, 57656
Euro-Pacific Joint Service Agreement, modification, 27235
New Orleans, Port of, et al. v. Seatrain International, S.A., 31233
North Atlantic Shipping Association Council et al., 28250
Pacific Westbound Conference; equalization and absorption rules and practices, 59134
Pacific Westbound Conference, investigation of rates, 56939
Pacific Westbound Conference; wastepaper and woodpulp to Japan, 14538, 20278
Seatrain, berthing of vessels in Puerto Rico, 27234
Freight forwarder licenses:
A & H Freight & Travel, Inc., 38622
AA Triangle Transfer & Warehouse Co., Inc., et al., 30620
Aeromarine Forwarding, 4678
Airguide Freight Forwarders, Inc., 8034
Alonso, Manuel, 29030
AM-CAN Freight Forwarders, Inc., 26482
American Disc Ltd., 46907
Apollo International, Inc., 3314
Argent-Cargo, Inc., et al., 1990
Atlantic Caribbean Export Shipping Corp. et al., 10440
Avery & Taylor Import-Export Services, Inc., 8297
Baker, Irons & Dockstader, Inc., 53819
Baltimore International Transport, Inc., 50244
Bolton & Mitchell, Inc., 15188
Bosco Services Freight Forwarding Co., 8033, 24138
Boyle, Gerald T., & Associates, 57186
C&J Forwading Inc., 19078
Carbonell Forwarding Co., 25740
Cargo Manila, Inc., 27606
Caribe Shipping Co., Inc., 57186
Cathay Forwarding Co., 51447
City Transfer Co., Ltd., 36690
Clemente, Arnold A., 32461
Click Delivery Service, Inc., 15189
Columbia Export Packers, Inc., 29030
Com-Air Freight, Inc., 45641
Concordia International Forwarding Corp., 45642
Confor International Corp., 38622
Cook, W.M., & Co., Inc., 57186
Cortina, Joseph, 8299
Cosdel International Co. et al., 24594
D'Amato Freight Forwarding Co., 46079
Drake Motor Lines, Inc., 52059
E.A.M. Internationl, 56936
Eskandari, Ghasem A., et al., 32462
Export Enterprises, Inc., 15499
Faro International et al., 3761
Fast International Forwarding Corp., 39174
Fox Forwarding Co., 60667
Garcia Brothers, 5065
Gateway Shipping Co., Inc., 15189, 19078
Global Freight Forwarders, Inc., et al., 14538
Gumbert, G.L., Co., 12378
I.A.C. International Corp., 29030
Import & Export Service Co., 11855
International Kam, Inc., 15365
Jamco International, Inc., 24138
"K" Express Co., Ltd., 9859
Klingman, John J., 57345
Kurdian International Transport, Inc., 51724
Lake Products, Inc., et al., 52289
Lakeshead Forwarding Corp., 52060
Land Joy International Forwarders, Inc., 13919, 31987
Latinvan, Inc., 51843
Leland Services, Inc., 1544
M.A. Graser-Rothe, 50244
Mainstream Forwarding Co., 26482
Merchant Box Co., 41086
Modern Transportation Services, Inc., 38622
Monumental Security Storage Co., 3762
Ocean Air Forwarding, Inc., 59903
Ocean Air Freight & Trade Inc., 59903
Oceanic Forwarding Co., 24138
Pacific Customs Brokers, 60226
Pan Ocean, Inc., 59903
Perfect Pak Co., 58628
Professional Transportation Consultants, Inc., et al., 39175

Ramasi Services, Inc., 25191
Reacer Export, Inc., 12378
Sanchez, Norma E., 3622, 7368
Sanda Trading Co., Inc., 27607
Schley Shipping Co., Inc., 50245
Schwartz, Gerald, 45642
Scully & Co., 5066
SeAir Forwarders, Inc., 40317
Shipper's Export Inc. et al., 16224
Sobelman, B. H., & Co., Inc., 3622, 19078
Spies Shipping Corp., 21724
Stowe & Teibel Inc., 57346
Surfaceair Multi-Modal Corp., 2444
Transcoast, Inc., 7025
Transgo Forwarding, Inc., 24138
Trimodal, Inc., 28251
Ultramar Express, 57346
Valle Forwarding Co., 51449
Vernon Forwarding Co., Inc., 57186
Walter Plunkett & Co., 51725
Warren, Robert A., 52519
Weicker Transfer & Storage Co., 3622
Weiss, Murray H., & Son, Inc., 31987, 36141
Williams Shipping Co., Inc., 59903
Wits Air Freight Inc., 58628
Freight forwarders, licensing; surety bond requirements, 52519
Improving Government regulations; report to President, 31987
Meetings; Sunshine Act, 1047, 1883, 2046, 2686, 3472, 3669, 4538, 5469, 7083, 7394, 7519, 7796, 8345, 9218, 9762, 10679, 11037, 12437, 12988, 13484, 14795, 15553, 16882, 17112, 18128, 19497, 20368, 21562, 22517, 23086, 23843, 24172, 24954, 25225, 25771, 26184, 26361, 27281, 27641, 29055, 29246, 29409, 30027, 30390, 31503, 32531, 32925, 34575, 35431, 35619, 37074, 37832, 38504, 38783, 38991, 39215, 40101, 41160, 41466, 42101, 42852, 44611, 46417, 47077, 47359, 49107, 49886, 50799, 51197, 51896, 53567, 54776, 55055, 56153, 57718, 58472, 58897, 59970, 61083
Oil pollution; certificates of financial responsibility, 1002, 1003, 1544, 4111, 4112, 4313, 6322, 7268, 8298, 11262, 11263, 11757, 14537, 15011, 16548, 17869, 21722, 21723, 22073, 25190, 31233, 31234, 31235, 34540, 34541, 34542, 38937, 38938, 38939, 39424
Organization and functions:
Managing Director; authority to issue orders to favored carriers, 2227
Managing Director; labor management agreements, 34842
Managing Director; show cause orders, etc., 3436
Rate increases, etc.; investigations and hearings, etc.:
Baltic Shipping Co., 47010, 48715
Matson Navigation Co., 3762, 6323
Pacific Westbound Conference; wastepaper and woodpulp to Japan, 14538
Trailer Marine Transport Corp., 49849
Trans-Pacific Freight Conference of Japan/Korea; treatment of overland /common point cargo, 40546
Union Camp Corp. et al., 17539
Self-policing functions, performance by agreement employee, petitions, 59904
Shipping, U.S. foreign trade; rates and transportation of property:
Rebates and similar malpractices; extension of investigation, 34843
State-owned or controlled carriers in foreign commerce of U.S.; identification, 51447
Tariff filing requirements; applications for exemption:
Crowley Maritime Corp., 13919
Foss, Launch & Tug Co., 57972
Tariffs, inactive, by independent carriers; cancelled, 6654
Wool trade with New Zealand; petition filed by ACE Lines, Ltd., 37218

## FEDERAL MEDIATION AND CONCILIATION SERVICE

**PROPOSED RULES**
Arbitration services, 52500, 53466
**NOTICES**
Committees; establishment, renewals, terminations, etc.:
Arbitration Services Advisory Committee, 46373
Improving Government regulations, 21993, 54139
Meetings:
Arbitration Services Advisory Committee, 10441, 26349, 42784, 58870
Privacy Act; systems of records; annual publication, 38512

## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

*See Mine Safety and Health Federal Review Commission.*

## FEDERAL PAPERWORK COMMISSION

**NOTICES**
Privacy Act; systems of records; transfer to GSA, 2424

## FEDERAL PAY, ADVISORY COMMITTEE

**NOTICES**
Annual pay increase; inquiry and meeting, 29155
Continuation of Committee; inquiry, 4650

## FEDERAL POWER COMMISSION

*See Federal Energy Regulatory Commission.*

## FEDERAL PREPAREDNESS AGENCY

**RULES**
Mobilization base preservation; placement of procurement and facilities in labor surplus areas; eligibility set-aside awards, 31132
Stabilization regulations for prices, rents, wages, and salaries; CFR part removed, 59378
**NOTICES**
Advisory committee review; inquiry, 10978
Environmental statements under preparation; procedures, 35101

## FEDERAL PREVAILING RATE ADVISORY COMMITTEE

**NOTICES**
Annual report; availability, 8850, 45642
Meetings, 2666, 6657, 11855, 15775, 23653, 26604, 31067, 38471, 39426, 41437, 42306, 45643, 48015, 49850, 50736, 52289, 55820, 56276, 59433

## FEDERAL PRISON INDUSTRIES

**RULES**
Inmate accident compensation; increase in awards, 28466
**PROPOSED RULES**
Inmate accident compensation; award change, 52498

## FEDERAL PROCUREMENT POLICY OFFICE

**PROPOSED RULES**
Anti-inflation measures affecting Federal contracts, 52032
Federal acquisition:
Formal advertising and contracting by negotiation; inquiry, 38880
Responsible contractors, qualified products and first article testing and approval; inquiry, 54962
System, definitions, and policies, 34824, 35736
Federal acquisition regulation project:
Availability of draft and inquiry, 51432
Availability of draft tax segment and inquiry, 49025
Organizational conflicts of interest; inquiry, 47480
**NOTICES**
Businesses, minority; subcontracting; procurement policy; inquiry, 14781
Consultative services; guidelines, 20065
Contracts, service; evaluation procedures; wage busting prevention for professionals, 18805
Cost Comparison Handbook; proposed policy, 43970
Federal acquisition regulation project, preliminary FAR structure and estimated release dates for comments on drafts, 28870
Government-wide procurement regulation development; inquiry; meeting, 9545
Management system criteria and data required of contractors; controls; proposed policy, 17885
Minority-owned advertising agencies, production companies, and media outlets; list, 30377, 38749
Motion picture productions, contracting system; policy, 39873
Private sector; Government reliance on for goods and services (A-76); proposed revision, 37410
Procurement Institute, Federal; name change, 7277
Procurement policy, Federal:
Real property assignment to non-Federal activities; proposed circular; hearing, 13119
Staff telephone numbers, 50977, 53075
State and local grantee procurement standards, guidelines; inquiry and hearing, 57201
Telecommunications functions; transfer; inquiry, 22468

## FEDERAL PROPERTY RESOURCES SERVICE

### PROPOSED RULES

Property management, Federal:
Strategic and critical materials, precious metals; recovery, 49548

### NOTICES

Land transfers:
Tennessee; transfer from DOE to TVA, 56941
Tennessee; transfer from ERDA to TVA, 59435

## FEDERAL RAILROAD ADMINISTRATION

### RULES

Accidents/incidents; investigations, etc.:
Biannual adjustment of reporting threshold, 51021
Acquisition and modernization assistance; CFR part revoked, 25346
Applications under section 505; internal rate of return information and forecast requirements, 14663
Emergency Rail Facilities Restoration Act:
Financial assistance, termination of certain programs, 25129
Employee hours of service:
Record keeping and reporting regulations, etc., 3124
Sleeping quarters, noise levels; guidelines, 30803
Sleeping quarters construction, 31012
Obligations guarantee; redeemable preference shares, etc., 14870
Passenger terminals, financial assistance for, 21887
Rail banking, acquiring interests in rail properties:
Interim regulations and inquiry, 14472
Repeal of rule, 56237
Rail service, local; assistance to States and persons; northeast and midwest region; applications and disbursements; correction, 1091
Rail service assistance to States; applications and disbursements, 860
Railroad freight car safety standards; inspection requirements, 59073
Rear end marking devices:
Approved devices, 36447
Penalty schedule, 56237
Regional Rail Facilities Reorganization Act:
Financial assistance, termination of certain programs, 25129
Safety enforcement procedures:
Civil penalty schedule, 7438
Signal systems reporting requirements:
Civil penalty schedule, 7438
Wheels, high carbon cast steel, for freight cars; removal; interim restrictions, 12691, 17472, 21334

### PROPOSED RULES

Freight car safety standards; periodic inspection, 45414
Highway grade crossing warning devices; maintenance, inspection, and testing standards; withdrawn, 45903
Locomotive inspection; strobe lights, 9324
Occupational safety and health standards, railroad; terminated, 10583
Operating rules:
Workmen, blue signal protection, 8162, 9512, 45416, 46555
Practice rules:
Lifting lugs safety inquiry, 46052
Safety regulatory program; inquiry, 19696, 26337, 36659, 43339, 45905, 58100
Tank cars, 105 insulated pressure; construction and design improvements; safety inquiry, 15167
Substitute service assistance to States; inquiry, 1108
Window glazing material in locomotives, passenger cars and cabooses, safety requirements, 47579

### NOTICES

Environmental statements; availability, etc.:
Chicago and North Western Transportation Co.; coal line project, Wyo., 52798
Freight railroad industry, prospectus for change, report; hearings, 51494
Hazardous materials transportation:
Consolidated Rail Corp.; emergency prohibition order, 22474, 51888, 54710
New York, Susquehanna & Western Railroad Co.; emergency prohibition, 18396, 25894
Intercity passenger service:
Station program cost sharing determination, 18394
Loan guarantee obligations:
Chicago & North Western Transportation Co., 41126, 43402, 52797, 55026
Missouri-Kansas-Texas Railroad Co., 17900
Meetings:
Minority Business Resource Center Advisory Committee, 11778, 17437, 25213, 34859, 47808, 56971
Rail services assistance program, local, 22262
Rail system plan, midwestern; development, 808, 4893
Petitions for exemptions, etc.:
ACF Industries et al., 12775
Amador Central Railroad Co., 4475
Amstar Corp. et al., 37295
Aroostook Valley Railroad Co., 51162
Association of American Railroads; conference, 5449
Auto-Train Corp., 35778
Belfast and Moosehead Lake Railroad Co., 51162
Boston & Maine Corp.; hearing, 33990
Canadian Pacific Railroad Co., 2683
Chicago, Milwaukee, St. Paul & Pacific Railroad et al., 33991
Chicago & North Western Railroad et al., 4701
Commonwealth of Pennsylvania et al., 807
Curtis, Milburn & Eastern Railroad Co., 60690
Duluth, Missabee & Iron Range Railway et al.; rear end marking devices, passenger commuter and freight trains, 41447
East Jersey Railroad & Terminal Co., 50067
Family Lines System, et al., 58438
Green Mountain Railroad Corp. et al., 36153
Lamoille Valley Railroad Co., 16586
Louisiana Southern Railway Co., 16586
Maryland & Delaware Railroad Co., 17899
Newburgh & South Shore Railway Co. et al., 56122
Octoraro Railway Inc. et al., 8607
Port Authority Trans Hudson Corp. (PATH), 56122
Savannah State Docks Railroad Co., 17900
Seaboard Coast Line Railroad, 45931
South Branch Valley Railroad Co., 60691
Texas South-Eastern Railroad Co., 50067
Union Pacific Railroad Co., hearing, 12775
Vermont Railway Co., 56122
Whitehead & Kales Co., 9910
Power brake equipment; Association of American Railroads; conference, 5449
Practice rules:
Lifting lugs; temporary stay of AAR requirements, 46106
Preference share financing applications:
Chicago & North Western Transportation Co., 26626
Fulcrum Venture Capital Corp., et al., 56744
Illinois Central Gulf Railroad Co., 39882
Independence Capital Formation, Inc., et al., 33358
Utah Railway Co., 1864
Rail services assistance program, local; meeting, 22262
Rail system plan, midwestern; development; meetings, 808, 4893
Rail system plan, northeast; supplemental transaction proposal, 49084
State participation program in investigative and surveillance activities; certification and agreement, 1978 FY, 49387
Tank cars, 112 and 114 uninsulated pressure; retrofit timetable; safety inquiry, 13652
Trustee certificates guarantee; intention to make findings, 10663
Wheel defects on trailer train (TTX) cars; safety inquiry, 12982
Wheels, high carbon cast steel, for freight cars; safety inquiry, 10751

## FEDERAL REGISTER OFFICE

### RULES

CFR checklist; 1976, 1977, and 1978 issuances, 1, 4247, 8251, 13865, 18535, 23701, 28805, 33675, 39069, 45339, 56203
CFR subscription rate, 10329

### NOTICES

Acts Requiring publication in Federal Register, 1977., SEE 1978 CFR Index
Freedom of information index requirements:
1977 annual guide to agency material, 4155
1978 annual guide to agency material, SEE October--December Federal Register Index, p. 71
Improving Government regulations, 21995, 59407
National Fire Code; standards; inquiry, 35548, 38941, 46582
Privacy Act; publication requirements, 1978; alternative plan, 23749
Record Retention Requirements Guide, 1978 edition, ordering information on 9/1 cover
Regulations drafting workshops:
February and March, 1161, 3636
April; certified interpreter for deaf, 6348
May and June, 8876, 14556
Rulemaking process, educational program; inquiry, 56727

## FEDERAL RESERVE SYSTEM

### RULES


Authority delegations:
- Board employees and Federal Reserve Banks; divestiture of bank shares, 4254
- Board of Governors, action in absence of quorum, 34482
- Board of Governors, nonbanking activities; shares or assets acquisition, 60262
- Board of Governors, organizational changes, 60266
- Consumer Affairs Division, Director; grant exemptions to States from consumer leasing provisions, 21332
- General Counsel; reconsideration requests, 49973, 52203

Bank holding companies (Regulation Y):
- Assets and activities, transferred; continued control; withdrawal and interpretation, 6214, 15147, 15321
- Municipal securities dealers, 10332
- Nonbanking activities; shares or assets acquisition, 60262

Banking institutions, State; membership (Regulation H):
- Loans by State member banks in special flood-hazardous areas, 18162, 20784

Banks, State; securities (Regulation F), 60549

Community reinvestment, 47148

Corporations engaged in foreign banking and financing; minimum reserve on U.S. deposits (Regulation K), 55239

Credit by banks (Regulation U):
- OTC margin stock list, 14304, 20966, 45821, 46956
- Purpose statement by mail, 30038

Credit by brokers and dealers (Regulation T):
- Credit, subordinated; extended for capital purposes, 31002, 33899
- Non-convertible corporate debt securities; extension to unlisted securities and uniform loan value, 43446
- OTC margin stock list, 14304, 20966, 45821, 46956

Credit by persons other than banks, brokers, or dealers (Regulation G):
- OTC margin stock list, 14304, 20966, 45821, 46956
- Purpose statement by mail, 30038

Credit extension by Federal Reserve banks:
- Discount rate changes, 45821
- Eligible bankers' acceptances; interpretation, 21434
- Purchase of warrants, compliance; removed, 53709
- Rate changes, 4002, 21658, 31883, 38571, 50867, 53707

Equal credit opportunity (Regulation B):
- Definitions; adverse action, clarification, 11969
- Joint residential mortgage loan applications; official staff interpretations, 39341
- Lending operations outside U.S.; official staff interpretation, 30531, 32742
- Official staff interpretations issuance; procedures, 18540, 19644, 21318
- Religious information, solicitation for marketing purposes; official staff interpretations, 11966

Foreign activities of member banks (Regulation M):
- Eurodollar borrowings, 38688

Interest on deposits (Regulation Q):
- Early withdrawal penalty, 58365
- Early withdrawal penalty; temporary suspension, 15408
- Early withdrawal penalty; temporary suspension for Wisconsin disaster areas, 41015
- Interest withdrawal, 58365
- Investment of U.S. Treasury funds, 19644
- Rates, maximum, 21436, 24516, 26425
- Savings deposits, withdrawals, 20002

Interpretations:
- Operations subsidiaries, purchase of stock; correction, 53414

Loans to Executive Officers of member banks; credit card indebtedness (Regulation O), 8506, 30039, 31883

Procedure rules:
- Applications, 49974
- Applications; community reinvestment, 47157
- Reconsideration requests, 49973, 52203

Purchase of warrants (Regulation E); CFR Part removed, 53709

Reserve bank directors:
- Financial interest conflict, 24668
- Financial interest conflict; prohibitions, 7611

Reserves of member banks (Regulation D):
- Deposits, definition of; exemption of bank with head office outside of U.S., 1616
- Eurodollar borrowings, 38688
- Investment of U.S. Treasury funds, 19644
- Supplementary reserve requirements; domestic and Eurodollar market borrowings, 52202

Securities credit transactions (Regulation X):
- OTC margin stock list, 14304, 45821, 46956

Sunshine Act; implementation, 34481

Truth-in-lending (Regulation Z):
- Balloon payments, refinancing, etc.; official staff interpretations, 5357
- Billing requirements, descriptive; nonsale credit transactions, 4419, 7979
- Consumer leasing; State application for exemption from requirements, 21318
- Credit life and disability insurance programs, premiums disclosure; official staff interpretation, 52695, 54924
- Credit sale disclosures; official staff interpretations, 47719, 55746
- Debiting date; official staff interpretations, 21321
- Disclosure of varying payments to repay indebtedness, 38813, 49529
- Disclosure placement on document; official staff interpretations, 26425
- Disclosure requirements; Massachusetts, exemption, 49973
- Discount to induce prompt payment; official staff interpretations, 13055
- Finance charge disclosure; official staff interpretation, 41016
- Finance charges and open end credit accounts; official staff interpretations, 3898
- Minor irregularities, maximum irregular period limits; official Board interpretation, 38814
- Official staff interpretations issuance; procedures, 18540, 19644
- Open end credit account; official staff interpretation, 38572
- Preservation of claims and defenses, New York law and Fair Credit Billing Act; official staff interpretation, 52697, 54924
- Record retention requirements; preservation of evidence of compliance, 22928
- Rescission requirements, exceptions; official staff interpretation, 56877
- Right of rescission; open end credit plans; interpretation, 50673
- Right of rescission; open end credit plans; official Board interpretations, 34113
- Sales tax disclosure; official staff interpretation, 30532, 32742
- Simple interest accounting methods; vehicle lease transactions; official staff interpretation, 47720
- Single written statement; official staff interpretations, 60265
- Student credit transactions, interim; official staff interpretation, 60263
- Student credit transactions, interim; staff interpretation; suspension of effective date and inquiry, 40211
- Student loan program disclosures; official staff interpretation, 32742
- Variable rate mortgages; official staff interpretation, 35026, 36052, 43018, 60264
- Wrap-around mortgages, treatment for disclosure purposes; official staff interpretations, 8117, 15148


### PROPOSED RULES


Bank holding companies (Regulation Y):
- Bank holding companies engaged in nonbanking activities; sale of insurance; inquiry, 23588, 27554
- Check verification services, 31936, 36281
- Insurance agency activities, permissable, 14970
- Money orders, travelers checks, savings bonds, etc.; permission to sell, 7440, 11584
- Nonbanking activities; establishment of foreign offices; procedures, 16191
- Nonbanking activities; shares or assets acquisition, 29796
- Securities, government-issued; underwriting and dealing in; withdrawn, 5382

Banking institutions, State; membership (Regulation H):
- Securities transactions recordkeeping and confirmation requirements, 5006, 12720, 50915

Community reinvestment, 29918

Community reinvestment; geographic proximity and military personnel, 57259

Credit by banks (Regulation U):
- OTC margin stock list, 11214

Credit by brokers and dealers (Regulation T):
- Credit, subordinated; extended for capital purposes, 23588
- Nonconvertible corporate debt securities; extension to unlisted securities and uniform loan value, 21008, 27554
- OTC margin stock list, 11214

Credit by persons other than banks, brokers, or dealers (Regulation G):
- OTC margin stock list, 11214

Electronic fund transfers; access devices issuance, consumer liability for unauthorized transfers, etc. (Regulation E), 60933

Equal credit opportunity (Regualtion B):
- Credit arrangers; business credit exemption, 49987

Financial institutions; credit needs of local communities, assessment; hearing, 3370, 7243, 13074
Interest on deposits (Regulation Q):
Penalty for early withdrawals, 32140
Savings deposits, automatic transfers, 5009
State member banks, securities; conformance with SEC (Regulation F), 10387
Truth-in-lending (Regulation Z):
Credit transactions, disclosure requirements; suspended, 16347
Disclosure of varying payments to repay indebtedness, 17363
HUD/FHA section 245 graduated payment mortgages; annual percentage rate computation; official staff interpretation, 41993
Interest reduction on time deposits used to secure loans; official staff interpretations, 38849
Minor irregularities; maximum irregular period limits, 23726

NOTICES
Commercial banks; condition and income reports forms; inquiry, 49050
Committees; establishment, renewals, terminations, etc.:
Consumer Advisory Council, 31988
Conduct standards; directors of FR banks and branches, 7706
Directors, branch; qualifications, etc., 29189
Equal credit opportunity and fair housing; enforcement guidelines, 29256
Fair housing advertising and poster requirements, 22444
Federal Open Market Committee:
Domestic open market operations, authorization, 3623, 9859, 43387, 52289, 55822
Domestic policy directives, 36, 3437, 9859, 13434, 18251, 22780, 28552, 33322, 37490, 45643, 50045, 57347
Foreign currency operations; authorizations and directives, 11856, 33322, 52289
Monetary aggregates, longer run ranges, 11264, 18768, 35099, 36002
Funds transfer and clearing services, Board actions, 1005, 17402
Home Mortgage Disclosure Act exemption applications:
Connecticut, 17402, 35394
Illinois, 35100
New Jersey, 7476
Improper payments by banks and bank holding companies, joint policy, 2759
Improving Government regulations, 45644
Inside information, use of; guidelines for State member banks, 12755
Intercorporate income tax accounting transactions; policy statement, 22782
Meetings:
Consumer Advisory Council, 7705, 21379, 39607, 55822
Meetings, open; procedure for processing request for material to be discussed, 2444
Meetings; Sunshine Act, 60, 816, 1172, 1431, 1583, 2046, 2474, 3238, 3341, 3472, 3990, 4316, 4749, 4914, 5131, 5915, 6195, 7083, 7394, 8225, 9406, 9762, 10468, 10469, 10612, 10679, 10680, 10788, 12437, 12987, 13162, 13657, 13658, 13966, 14272, 14795, 15231, 15405, 15835, 16645, 17907, 18399, 18400, 19104, 19330, 19497, 20368, 20611, 21105, 21792, 22153, 22805, 23086, 24172, 24653, 25225, 26184, 26362, 26531, 26681, 27641, 27954, 29055, 29409, 29887, 30390, 30981, 32925, 34266, 36031, 36198, 36339, 37074, 37332, 37536, 38783, 39637, 40102, 40350, 40601, 41160, 41335, 42101, 43813, 44611, 45688, 45943, 46156, 46417, 46923, 47077, 47649, 47811, 49108, 49603, 50282, 50539, 50799, 51505, 51896, 52091, 52602, 53102, 53897, 54776, 55311, 55562, 55837, 56337, 56966, 57718, 58143, 58144, 58255, 58703, 59244, 60249, 11298B
Organization and functions:
Monetary and Financial Policy, Office of Staff Director, 59550
Privacy Act; systems of records; annual publication, 41164
Truth-in-lending; exemption applications:
Massachusetts, Commissioner of Banks, 36002
*Applications, etc.:*
Alabama Bancorporation, 43387
Alaska Bancorporation, 55820
Alden Investment Co., Inc., 38472
Allied Bancshares, Inc., 39607
Alma Bancshares, Inc., 50736
Alpha Agency, Inc., et al., 46373
American Bancor, Ltd., 16225
American National Kimball Corp., 36515
Ames Holding Co., Ltd., 1407
Ankeny Bancshares, Inc., 43387
Anson Bancshares, Inc., 49049
Arkansas Best Corp., 40317
Arkansas Valley Bancshares, Inc., 36002
Ashland Bancshares, Inc., 7025
Assets, Inc., 1129
Associated Banc-Corp., 8034
Balch Springs Bancshares, Inc., 24595
Banco Nacional De Mexico, S.A., et al., 14107
Bancohio Corp., 6164
Banconac Shares, Inc., 12085
Bancorporation of Montana, 4456
Bank Group One Corp., 26482
Bank Land Co., 26482
Bank of Mansfield Holding Co., 59904
Bank of Virginia Co., 36002
BankAmerica Corp., 24912
Bankshares of Nebraska, Inc., et al., 2227
Barnett Banks of Florida, Inc., 37489
Bates County Bancshares, Inc., 31068, 32462
Bay Banks, Inc., 26483
Bedford Bancorp, 3623
Bellevue Holding Corp. et al., 21944
Bellwood Bancorporation, Inc., 27607
Bourbon Bancshares, Inc., 1407
Bovina Bancshares, Inc., 22780
Bowman Capital Co., 56939
Browning Bancshares, 2759
Brownwood Bancshares, Inc., 22780
Byron Bancorporation, Inc., 49050
Byron Bancshares, Inc., 8034
Capital Management, Inc., 55821
Capitol Bancorporation, 25868
Carroll County Bancshares, Inc., 53496
Carthage Bancshares, Inc., 46582
Catoosa Bancshares, Inc., 53820
CB & T Bancshares, Inc., 58431
Cedar River Bancorporation, 38472
Central Bancshares of the South, Inc., 12755, 21033
Central National Bancshares, Inc., 21034
Central National Corp. et al., 7026, 37489
Central Wisconsin Bankshares, Inc., 56939
Centran Corp., 4456
Century Bancshares Corp., 41437
Charter 95 Corp., 50736
Chemical Financial Corp., 16225
Chemical New York Corp., 3436, 8035, 12085, 13630, 15190
Chenoa Corp., 46373
Cherokee Investment Co., Inc., 11603, 35101
Chevalier, Inc., 12378
Chicago Holding Co., 16549
Chilton Bancshares, Inc., 3437
Citibanc Holding Co., Inc., 25475
Citicorp, 1407
Citizens, Inc., 46374
Citizens Ban-Corporation, 52772
Citizens Bancorp, Inc., 9653, 25868
Citizens Bancshares, Inc., 30620
Citizens Bankshares, Inc., 24595, 46374
Citizens & Southern Corp., 29627
City Bancshares, Inc., 16549
Clarkson Management Co., 26483
Clayton Banshares, Inc., 57346
Coffeyville Financial Corp., 1839
Colonial American Bankshares Corp., 47012
Colonial Mortgage Service Co. Associates, Inc., 4285
Comanche Bancshares, Inc., 31990
Commerce Bancshares, Inc., 8035
Commerce Companies, Inc., 15365
Commerce Southwest, Inc., 40317
Commercial Bankshares, Inc., 27607
Commercial National Corp., 9859
Community Bancorporation, 18613
Community Holding Co., 21944
Corning Investment Co., Inc., 51843
Corwith State Bancshares, Inc., 4457
Corydon Bancorporation, 8037
Cottonwood Bancorporation, 27894
Credit and Commerce American Holdings, et al., 58431
Dean Holbein & Associates, Inc., 26483
Dearmin Bancorp, Inc., 40059
Decatur County Bankshares, Inc., 20278
Delaware Service Co., Inc., 59904
Denison Bancshares, Inc. of Holton, 58431, 59549
Deshler State Co., 3437
DeSoto Financial Corp., 51843
Detroitbank Corp., 33821
DSB Corp., 14108
Duclarkee, Inc., 29988
Eads Bancorporation, 33323
El Paso Bancshares, Inc., 21034
Else Investment Co., 35101
Empire Bancorp, Inc., 12086
Enterprise Capital Corp., 50969
Equimark Corp., 36141
Equitable Bancorporation, 1129
Everest Bancshares, Inc., 10977
Exchange Bancorporation, Inc., 27894
F.M. Financial Corp., Inc., 21724
F & M National Corp., 9350, 38940
F.N.B.C. of Lagrange, Inc., 30621
Fairbank Bancshares, Inc., 41437
Fairmont Bancorporation, Inc., 59434
Falsbuilding, Inc., 47013
Farmers Banshares of Abilene, Inc., 16225
Farmers & Merchants Corp., 1839
Fayette Bancorporation, 35101
FICO, Inc., 47788
Fidelity Union Bancorp., 15191
Financial Bancshares, Inc., 1130
Financial General Bankshares, Inc., 53496
First Affiliated Bancorporation, Inc., 5066

First Alabama Bancshares, Inc., 25868, 26483
First American Bank Corp., 35100
First Apache Bancshares, Inc., 53496
First Arkansas Bankstock Corp., 19079
First Banc Group of Ohio, Inc., 27893, 47013
First Bancgroup-Alabama, Inc., 15500
First Bancorp, Inc., 7368, 26483
First Bancorp of N. H., Inc., 21034, 31990
First Bancorporation, 31434
First Bancshares of Hoxie, Inc., 59549
First Bank Holding Co., 14361
First Bankshares Corp. of S.C., 33323
First Chandler Corp., 19452
First City Bancorporation of Texas, Inc., 9350, 12086, 40317, 52772
First Clinton Bancorporation, Inc., 16810
First Cordell Banco, Inc., 59434
First Corp., 21724
First Cushing Bancshares, Inc., 27608
First Danvers Corp., 50736
First Edwardsville Corp., 12086
First Evergreen Corp., 25475
First Financial Bancshares, Inc., 41087
First Formoso, Inc., 12086
First Gridley Bancorporation, Inc., 4457
First Hawaiian, Inc., 56940
First Holdrege Bancshares, Inc., 49050
First Illinois Corp., 35395
First International Bancshares, Inc., 6164
First Kansas Bancorp., 25475
First & Merchants Corp., 20278
First Michigan Bank Corp., 45643
First Missouri Banks, Inc., 11603
First Munday Bancshares, Inc., 56940
First National Bancshares Inc., 1407
First National Bank of Gillette Holding Co., 29032
First National Corp., 56940
First National Hamilton Bancshares, Inc., 10978
First National Holding Corp., 35101
First Railroad & Banking Co. of Georgia, 35100
First Security Corp., 7025, 40059
First State Bancorp, Inc., 1990
First State Bancorporation, 24595
First State Bancshares, Inc., 18767, 27607
First State Holding Co., Inc., 59434
First State Holding Co. of Elkhart, 2227
First Steuben Bancorp, Inc., 5889, 23760
First Temple Corp., 43387
First Texas Bancorp, Inc., 47013
First Thomas Ban Corp., 12086
First Union Bancorporation, 4679
First Virginia Bankshares Corp., 36002
First West Fargo Holding Co., 30620
First-Taylor Financial Corp., 15012
FirstBancorp, Inc., 44566
Firstrust Bancshares Corp., 22780
Fischer Corp., 45643
Florida Bancorporation, Inc., 27608
Florida Bankshares, Inc., 26483
Florida National Banks of Florida, Inc., 37490
Forest City Ltd., 27608
Forest Hill Bancshares, Inc., 19453
Four Seasons of Wis., Inc., 55283
Franklin Bancgroup & Co., 11603
Galveston County Bancshares, Inc., 21034
Garnett Bancshares, Inc., 28252
Georgia Bancshares, Inc., 38472
Gering National Co., 19720
Gibson Bancshares Corp., 5889
Glen Rose Bancshares, Inc., 18251
Glen-An Corp., 25475
Golden Spread Financial Corp., 31990
Gordon Financial Corp., 25475
Grandview Bancshares, Inc., 22781
Great Southwest Ban Corp., Inc., 15365
Great Wisconsin Corp., 17540
Greencastle Investment Corp., 41438
Greenup National Corp., 9350
Groom Bancshares, Inc., 3437
Guaranty Corp., 32860
Haleco Bancshares, Inc., 22783
Harlingen National Bancshares, Inc., 29032
Harrogate Corp., 22783
Haskell Bancshares, Inc., 36003
Hawkeye Bancorporation, 1005, 8037, 18768
Herget Financial Corp., 29989
Hickory Bancorp, Inc., 27608
Holladay Bancorporation, 14361
Home State Bancshares, Inc., 5889
Hong Kong & Shanghai Banking Corp. et al., 44566
Houston Bancshares, Inc., 56940
Hunter Holding Co., 49050
I.B.F. Delaware Corp., 59434
Illini Bancorp, Inc., 12755
Indian Head Banks, Inc., 21945
Jackson Hole Banking Corp., 24595
Jacksonville National Corp., 47014
Jacomo Banchares, Inc., 55821
Jadam Enterprises, Inc., 50736
Janada Bancshares, Inc., 50044
JEFCO, Inc., 8037
Johnson County Bankshares, Inc., 33323
Joy Development Corp., 38940
K-4 Banco Corp., 8038
Kenco Bancshares, Inc., 20279
Kerkhoven Bancshares, Inc., 28252
Keystones Bancshares, Inc., 15500
Kincaid Banc Agency, Inc., 37
Kyowa Bank Ltd., 16225
Labette County Bankshares, Inc., 23760
Lakeside Bank Holding Co., 40317
Lamb's Bancorporation, Ltd., 55821
Lewisville Bancshares, Inc., 27609
Lime Springs Investment Co., 25476
Lockney Bancshares, Inc., 52772
Longview Financial Corp., 58431
Loomis Co., 38940
Louisville Co., 36515
M & M Financial Corp., 27893
M.S.B. Agency, Inc., 50044
Madison National Co., 1005
Magnolia Bancshares, Inc., 55283
Mankato Bankshares, Inc., 4457
Marjon Bancorporation, Inc., 53819
Marsh Investments, N.V., et al., 52772
Marshall & Ilsley Corp., 40059
Maryland National Corp., 31990, 47013
Meadows Bankcorp, Inc., 1990
Mercantile Bancorporation, Inc., 3437, 5066, 16550, 49366
Mercantile Texas Corp., 10733, 50044
Metropolitan Bancorporation, 57346
Michigan National Corp., 59549
Mid-America Bancshares, Inc., 15012
Mid-Tex Bancshares, Inc., 50969
Midland Capital Co., 12378
Miles Service Corp., 50969
Minneapolis Holding Co., 51843
Missouri Country Bancshares, Inc., 36515
Missouri State Financial Corp., 15191
Mizrahi Holdings Association et al., 5889
Moline Manufacturing Co., 24913
Morrill Bancshares, Inc., 50044
Morris County Bankshares, Inc., 38940
Mountain Financial Services, Inc., 21380
Muyskens Corp., 18251
NCNB Corp., 9653, 43388, 45644
National Bancshares Corp. of Texas, 37, 6164, 20279, 33324
National City Corp., 56101, 58230
National Detroit Corp., 22781, 47788, 59435
National Westminster Bank, Ltd., et al., 57346
New Hampton Bancshares, Inc., 19720
New Virginia Bancorporation, 47014
Newman Bancshares, Inc., 42040
North Central Banco, Inc., 51843
North Dakota Bancshares, Inc., 14361
North Kossuth Investment Co., 42040
Northeast United Bancorp, Inc. of Texas, 18768
Northern Cities Bancorporation, Inc., 38472
Northern Investment Co., 7368
Northwest Bancorporation, 35100
Northwest Financial Corp., 60335
Northwest Ohio Bancshares, Inc., 1840, 49050, 52772
Nortrust Corp., 8591
Oakland Financial, Inc., 9654
Oakland Financial Services, Inc., 9351
Ohio County Bancshares, Inc., 51844
OK Bancorporation, Inc., 47788
Oklahoma National Banshares, Inc., 46374
Old Stone Corp., 22781, 60335
Orbanco, Inc., 21034
Ormsby Bancshares, Inc., 57347
Otto Bremer Co., 12086, 12087, 15366
Otto Bremer Foundation, 37
Overland Park Bancshares, Inc., 14108
P.N.B. Financial Corp., 12087
Pacesetter Financial Corp., 10733
Palisade Bancshares, Inc., 55284
Pampa Bancshares, Inc., 16225
Panhandle Bancshares Corp., 51844
Pecatonica Bancshares, Inc., 29628, 30127
People's Corp., 27894
Peoples States Bancshares, Inc., 51844
Phelps County Bancshares, Inc., 15366
Pioneer Bancorp, Inc., 22445
Pioneer Bancorporation, Inc., 52290
Plainview Bancshares, Inc., 38941
Platte County Bancshares, Inc., 16550
Polk County Banco, Inc., 15013
Prairie Bankshares, Inc., 12087
Quail County Investment Corp., 38941
Quail Creek Bancshares, Inc., 35100
Quanah Bancshares, Inc., 8038
Quitman Capital Corp., 1652
Rainier Bancorporation, 49050
Raymondville State Bancshares, Inc., 56940
Republic Bancorporation, Inc., 21035
Republic National Bancshares, Inc., 33324
Republic of Texas Corp., 3175, 14108, 15500, 16226, 18613, 35547, 41438, 51844
Retirement Research Foundation, 30621
River Oaks Bancorp, Inc., 24913
Rose Banco, Inc., 50044
Royal Trust Bank Corp. et al., 5890
Royal Trustco Ltd., 3438
Rushford Bancorporation, Inc., 52290
Russell State Bancshares, Inc., 40317
Ruth Jones Nelson Finance Corp., 51844
SBT Corp., 40318
S & S Holding Co., 31068
SAC City Ltd., 59904
SafraCorp., 56941
San Augustine Bancshares, Inc., 14108

Santa Fe Trail Banc Shares, Inc., 37
Savings Bank Shares, Inc., 55821
SBT Corp., 1653
Sebeka Bancshares, Inc., 2228
Security Bancorp, Inc., 24595
Security Bancshares, Inc., 41086
Security Bancshares of Montana, Inc., 58432
Security Pacific Corp., 37, 37490
Service Bancorporation, 26484
Shawnee Bank Shares, Inc., 12087
Sibley Bancorp., 15191
Snowmass Bancorporation, 1130
Society Corporation, 53820
South Plains Bancshares, Inc., 47789
Southern Bancorportion of Alabama, 29032
Southwest Bancshares, Inc., 25476, 32462, 43387
Southwest Florida Banks, Inc., 52773
Southwest National Corp., 22781
St. Anthony National Co., 47014
St. Joseph Agency, Inc., 46374
St. Joseph Bancshares, Inc., 31068
Stamford Financial Corp., 31990
Standard Chartered Bank Ltd., 56941
State Bancshares, Inc., 32463
State Exchange Bancshares, Inc., 37490, 38940
State National Bancorp, Inc., 55284
State National Financial Corp., 56941
Stratton Agency, Inc., 3943
Strawn Bancshares, Inc., 22781
T & C Bancorp, Inc., 51844
Tarrant Bancshares, Inc., 49050
Tennessee Homestead Co., 15013
Texas American Bancshares, Inc., 28252, 56102, 58230
Texas Bancorp Shares, Inc., 10734
Texas Commerce Bancshares, Inc., 9351, 17540, 22781
Texas Panhandle Bancshares, Inc., 40059
Thomson Investment Co., Inc., 59905
Townsend Financial Corp., 46907
Trans Texas Bancorporation, Inc., 35395
Tri County Investment Co., 12379
Triro Bancorporation, Inc., 38
Trust Co. of Georgia, 13435
Tulbancorp, Inc., 26484
Tuscumbia Bancshares, Inc., 14108
U.S. Trust Corp., 14108
Union Bancgroup & Co., 9351
Union Bancorporation, Inc., 2444
United Bancshares, Inc., 8591, 51845
United Bank Corporation of New York, 32463
United Michigan Corp., 8038
Urich Bancshares, Inc., 41087
Valley Bank Shares, Inc., 3623
Viking Corp., 1840
Villa Grove Bancshares, Inc., 21725
Wachovia Corp., 33324
Walsh Bancorporation, Inc., 47789
Weatherford Bancshares, Inc., 18613
Wedge Holding Co., 1007
Wells Fargo & Co., 16550
West Georgia Financial Corp., 40318, 45920
West Plains Bancshares, Inc., 55821
Western Bancshares, Inc., 44567
White Oak Bancshares, Inc., 58432
Wisconsin Ban Corp., 33325
Wood River Financial Services, Inc., 55284
Woodford Investment Co., 13435
Wyoming Bancorporation, 10441
Wyoming National Corp., 50044
Yellow Medicine Bancshares, Inc., 50045

## FEDERAL SERVICE IMPASSES PANEL

### NOTICES

Privacy Act; systems of records; annual publication, 39937

## FEDERAL STATISTICAL POLICY AND STANDARDS OFFICE

### NOTICES

Standard industrial classification; revised procedures and principles for revision, 60631
Standard metropolitan statistical areas; proposed changes in criteria; designation and definition; hearing, 60331
Standard metropolitan statistical classification, proposed criteria for establishment, 55954

## FEDERAL SUPPLY SERVICE

### RULES

Procurement:
Contract operations, etc., 1347
Procedural guidelines for special procurement, agencies in Alaska, etc., 23575, 25692
Procedures and contract clauses, 51395
Property management:
Motor vehicle data reporting requirements, 49538

### PROPOSED RULES

Procurement:
GSA self-service stores, 36488
Property management:
U.S. Government National Credit Card; preparation and control, 51429

### NOTICES

Procurement:
Life cycle costing; research support to extend use; inquiry, 46584
Property management, temporary:
Strategic and critical stockpile materials; list, 30127

## FEDERAL TRADE COMMISSION

### RULES

Administrative interpretations, etc.:
Secret coding in marketing research, 42742
Bedding manufacturing and wholesale distributing; CFR Part rescinded, 954, 1790
Conduct standards, 25333, 26426, 31129
Fair Credit Reporting Act, interpretations; undesignated information from file of applicant's spouse, 9471, 13058
Franchising and business opportunity ventures; disclosure requirements and prohibitions, 59614
Freedom of information, 5802, 11978
Fuel economy advertising guide for new automobiles, 55747
Games of chance in food retailing and gasoline industries; exemptions:
FNK Enterprises, 25336
Glendinning Companies of Connecticut, Inc., et al., 28998
Jewelry industry; use of term gold, 30538
Mergers and acquisitions; financial transactions and institutions; transitional policy, 27517
Octane numbers, minimum; posting on gasoline dispensing pumps; CFR Part superseded, 43023
Ophthalmic goods and services; advertising of prescription eyewear or eye examinations, 23992, 25995, 46297
Organization and functions:
Cleveland regional office; address change, 754
Regional Office, Washington, D.C.; elimination, 6579, 17351
Premerger notification, 33544, 34443, 36054
Authority delegation to Assistant Director for Evaluation, Bureau of Competition, 60270
Procedures and practice rules:
Adjudicative proceedings; commencement, 11978
Adjudicative proceedings; consent order settlements, disclosure of materials, 3089, 51758
Adjudicative proceedings; flammable fabrics, reference deleted, 754
Adjudicative proceedings; interlocutory appeal, 56902
Commission meetings; transcript disclosure, 35684
Commission proceedings; service of documents, 56903
Commission records, reproduction and search fees, 57593
Compliance reports, delegation of authority to regional directors, 6580
Compulsory process, motions to quash, 56868
Consent order settlements, reference, 754
Discovery rules, 56862
Freedom of information; records disclosure requests, 5802
Magnuson-Moss rulemaking proceeding; subpoenas, 11691
Nonadjudicative procedures; access to documentary evidence, 17352
Nonadjudicative procedures; consent order settlements, disclosure of materials, 3089, 4972, 51758
Nonadjudicative procedures; preliminary investigations, 10684
Rulemaking proceedings; alternative procedures, 35683
Trade regulation proceedings; appointment of presiding officers and public participation compensation, 39084
Prohibited trade practices:
Aldens, Inc., 59478
American Service Bureau, Inc., 47721
Australian Land Title, Ltd., et al., 49981
Bede Aircraft, Inc., et al., 56654
Block Drug Co., Inc., et al., 5512, 59478
Boise Cascade Corp. et al., 9469
Borden, Inc., 57143
Capax, Inc., et al., 27782, 60273
Capital Builders, Inc., et al., 38815
Chrysler Corp., 3090
Coca-Cola Co. et al., 20967, 23991
Cooga Mooga, Inc., et al., 40804
Corning Glass Works et al., 59479
Coventry Builders, Inc., et al., 55347
Damon Corp., 13056
Driver Training Institute, Inc., et al., 38381
Ferrara Imports, Ltd., et al., 18651
Firestone Photographs, Inc., et al., 21875
Fruehauf Corp., 13057
G C Services Corp. et al., 32128
Georgia-Pacific Corp., 25811

Gold Bullion International, LTD., et al., 38688
Grand Spaulding Dodge, Inc., 3090
Grolier, Inc., et al., 18652
Hiken Furniture Co., 30794
Insilco Corp. et al., 21877
Interco Inc. et al., 48991
Jay Norris Corp. et al., 33901
Jim Walter Corp., 6763
John Hancock Mutual Life Insurance Co. et al., 50676
Johnson Products Co., Inc., 18657
Kraftco Corp. et al., 51013
Lancaster Colony Corp. et al., 9470
Levi Strauss & Co., 35262
Lustrasilk Corp. of America, Inc., et al., 34124
Marathon Oil Co., 52216
Mego International, Inc., et al., 37174
Moore & Associates, Inc., et al., 55348
National Commission on Egg Nutrition, et al., 60271
National Fire Hose Corp. et al., 57143
National Housewares, Inc., et al., 4003
National Indemnity Co. et al., 52467
Norlic Import Co., Inc., et al., 9471
Nosoma Systems, Inc., et al., 29557
Owens-Illinois, Inc., et al., 59479
PepsiCo, Inc., 20969, 23991
Performance Sailcraft, Inc., 23991
Perpetual Federal Savings & Loan Association, 5360
Porter & Dietsch, Inc., et al., 9141
Public Service Co. of Colorado, 47173
Reichhold Chemicals, Inc., 18650
Retail Credit Corp., 37429
Rubbermaid Inc., 40454
Ryder System, Inc., 5802
Safeway Stores, Inc., 26426
Security Pacific Mortgage Corp., 13056
Townsman-Cenco International, Ltd., et al., 21876
Trans World Accounts, Inc., et al., 2388
United Builders, Inc., et al., 39350
Universal Figure Form of Youngstown, Inc., et al., 5513
Uslife Credit Corp. et al., 34125, 48628
Verrazzano Trading Corp. et al., 28178
Vital-E, et al., 59480
Warner-Lambert Co., 36433
Womack, Samuel E., et al., 59480
Xerox Corp., 21323
Sunshine Act; implementation, 1937, 35684
Trade practice rules; various industry guides:
Rescission of obsolete parts, 44483
Vocational and home study schools, proprietary; advertising, disclosure, cooling-off, and refund requirements, 60817
Warranties:
Service contracts and implied warranties, automobile dealers; advisory opinion, 57244
Written warranty terms, pre-sale availability; home building industry, advisory opinion, 35684

**PROPOSED RULES**

Antacids, over-the-counter; advertising, 38851, 41051
Appliances, consumer; energy cost and consumption information in labeling and advertising, 31806, 41410
Cellular plastic products, disclosure of combustion characteristics in marketing and certification, 35341
Children's TV advertising, 17967, 18692, 37203
Consent orders:
Advertising Checking Bureau, Inc., 35054
Aldens, Inc., 6622
American Service Bureau, Inc., 27849
American Society of Anesthesiologists, Inc., 46856, 50698
Art Instruction School et al., 51031, 54944
Australian Land Title, Ltd., et al., 18685, 25349
Bede Aircraft, Inc., et al., 26324, 27852
Block Drug Co., Inc., et al., 39120
California Medical Association, 11709
Capital Builders, Inc., et al., 22992, 26335
Conventry Builders, Inc., et al., 36281
Cooga Mooga, Inc., et al., 21009, 24066
Corning Glass Works et al., 41233
CPC International Inc., et al., 58381
Credit Bureau Associates et al., 38711
Driver Training Institute, Inc., et al., 5383
Federal Signal Corp., 49543
Ferrara Imports, Ltd., et al., 2406
Ford Motor Co. et al., 54944
General Mills Fun Group, Inc., 57267, 58830
Harnischfeger Corp. et al., 45593, 48657
Harper Sales, Inc., et al., 9493, 32142
Hertz Corp., 47736, 49545
Hiken Furniture Co., 14053
Indiana Dental Association et al., 53767
Insilco Corp. et al., 5846, 9623
Interco Inc. et al., 31345
International Brotherhood of Teamsters (Local 959), 31022, 42017, 54944
John Hancock Mutual Life Insurance Co. et al., 29797
Kaufman & Broad, Inc., et al., 29304, 40536
Kelcor Corp. et al., 49818
Levi Strauss & Co., 10572
Louisana-Pacific Corp., 40882
MacLeod Mobile Homes, Inc., et al., 9495, 21337, 32142
Marathon Oil Co., 35338
McDonnell Douglas Corp. et al., 36973, 38851
Mego International, Inc., et al., 9623, 13074
Mobile Homes-Multiplex Corp. et al., 9497, 11834, 32142
Moore & Associates, Inc., et al., 36642
National Fire Hose Corp. et al., 37712
National Indemnity Co., et al., 35339
National Systems Corporation and North American Correspondence Schools, 50446, 53450
Nelson Brothers Furniture Corp., 28210
New Jersey Pest Control Association, Inc., 50189
Norris Industries, Inc., 49315
Public Service Co. of Colorado, 19053, 25349
Roland International Corp. et al., 14524
Royal Furniture Co., Inc., et al., 33931
S. Klein, Inc., 30297
Safeway Stores, Inc., 1506
Townsman-Cenco International, Ltd., et al., 6808
United Builders, Inc., et al., 22988, 26335
Vital-E et al., 43313
Womak, Samuel E., et al., 38587
Zayre Corp., 40537
Consumers' claims and defenses, preservation:
Presiding officer's report, availability, 6810
Staff report, availability, 54950
Credit practices; report availability, 47197
Drugs, prescription; retail price disclosure; withdrawal, 54951
Food advertising:
Presiding Officer's report; issuance, 11834
Staff report; availability, 55771
Freedom of information; fee schedule, 779, 1804
Fuel economy guide; advertising for new automobiles; inquiry, 34496
Funeral industry practices; report publication, 26588, 34500
Games of chance in food retailing and gasoline industries:
Hiatus provision, 48654, 50191
Health spas; hearings, 8268
Hearing aid industry, staff report; availability, 54103, 57612
Insulation materials, residential thermal; labeling and advertising:
Hearing, 51308
Report publication, 32142, 37203
Mobile home sales and service; hearings, 19668
Motor vehicles, used, sale of:
Presiding officer's report, publication, 28521
Staff report, publication, 52729
Octane ratings of automotive gasoline; certification and posting, 43028
Hearings, 46550
Staff report, availability, 60176
Procedures and practice rules:
Adjudicative procedures; protection of confidential business information, 3571
Nonadjudicative procedures; protection of confidential business information, 3571
Participation by former members and employees in Commission proceedings, 35947
Protein supplements; advertising and labeling; report availability, 33258
Standards and certification for product marketing, 57269, 59517
Textile products and leather wearing apparel; care labeling; report availability; inquiry, 26334, 37459
Veterinary goods and services; advertising; decision not to initiate rulemaking; inquiry, 60954
Warranties:
Consumer products; refund depreciation deductions; terminated, 4054

**NOTICES**

Authority delegations:
Consumer Protection Bureau Director; referral of complaints, 1991
Cigarette testing results; tar and nicotine content, 11856, 16550, 22768, 25385
Dairy industry; future mergers, assessment criteria, 1992
Dairy industry premerger notification program; filing requirements; correction, 28047, 34543
Improving Government regulations, 35353, 38623
Meetings; Sunshine Act, 1172, 1431, 2046, 3010, 3238, 3472, 3473, 3669, 4750, 5469, 6715, 6716, 7083, 7519, 8058, 8682, 9762, 9763, 10788, 11893, 12180, 13484, 13485, 14272, 14795, 15553, 15554, 17113, 18400, 19330, 19498, 21408, 21563, 21792, 22806, 24169, 25225, 26184, 26362, 26531, 27641, 28612, 29409, 30027, 30390, 31503, 32532, 38991, 39924, 41335, 41466, 42852, 43617, 46417, 47359, 47811, 49604, 50283, 50985,

52091, 52602, 54350, 54351, 55311, 56757, 58012, 58898, 11298B
Mergers and acquisitions:
Corporate premerger notification program; filing requirements, 28045, 57656
Premerger notification waiting period; early terminations:
Anderson, R. Quintus, 44567
Canada Development Corp., 58432
Central Telephone & Utilities Corp., 44567
Creusot-Loire Steel Corp., 46908
Geosource, Inc., 54140
ICI Americas, Inc., 43767
McGraw Edison Co. Profit Sharing Trust et al., 56995
Metromedia, Inc., 52060
Sanyo Electric Co., Ltd., et al., 46582
Southwide, Inc., 52060
Tappan Co., 48016
Travelers Corp., 58432
Privacy Act; systems of records, 50969, 59550
Privacy Act; systems of records; annual publication, 40110, 44886
Solar energy industry competition; publication availability and inquiry, 35747
Unordered merchandise; interpretation and policy statement, 4113
Warranties, advisory opinions:
Wisconsin Mobile Home Warranty law, 50737, 53496
Warranties; informal dispute settlement procedures; exemptions
Home Owners Warranty Corp., 37491, 38746
Warranties, request for waivers:
Coleman Co., Inc.; denied, 1991, 3175

## FINE ARTS COMMISSION

### NOTICES

Meetings, 4452, 10718, 15178, 18602, 24117, 29822, 34182, 38614, 46062, 51125, 57347

## FIREARMS AND AMMUNITION

*See Alcohol, Tobacco and Firearms Bureau.*

## FISCAL SERVICE

### RULES

Bonds, U.S. savings:
Series E; redemption tables, 8083
Series H offering; interest payments schedule, 8079
Checks drawn on the U.S. Treasury, issue of substitutes of lost, destroyed, mutilated and defaced; indemnity undertaking, 59060
Federal taxes depositories:
Treasury tax and loan accounts, 18970, 26309, 47506
Public money depositories:
Treasury tax and loan accounts, 18967, 26309, 47506
Savings bonds and notes:
Treasury tax and loan accounts, 18972, 26309, 47507
Surety companies doing business with U.S.:
Annual renewal certificates of authority and reinsurance agreement forms, 39088
Application and renewal fees, 12677
Treasury tax and loan depositories insurance; tax and loan accounts, 18972, 26309, 47506

### PROPOSED RULES

Surety companies doing business with U.S.:
Application and renewal fees, 6812

### NOTICES

Surety companies acceptable on Federal bonds:
Aetna Reinsurance Company, 24762
Allianz Insurance Co., 17439
Allied Surety Co., 28883, 29391
American & Foreign Insurance Company et al., 22263
American Re-Insurance Co., 15211
Amwest Surety Insurance Co., 7389
Binford Insurance Co., 12418
Builders Mutual Surety Co., 14197
Continental Reinsurance Corporation, 25400
Continental Surety and Fidelity Insurance Co., 43403, 44952
Farmers Home Mutual Insurance Co.; termination, 12779
Fritz Insurance, 8322
INA Underwriters Insurance Co., 23668
Indiana Bonding & Surety Co.; termination, 18080
Insurance Company of the Pacific Coast, 46915
Integon Indemnity Corp., 4702
Iowa Mutual Insurance Company, 21962
London Guarantee & Accident Co. of New York, 3787
Metropolitan Fire Assurance Co., 21390
National Reinsurance Corp., 23669
Old Republic Insurance Co., 39205
Puritan Insurance Company, 18808
Ranger Insurance Co., 40971
SAFECO National Insurance Co., 58878
Van Tol Surety Co., Inc., 1659
Surety companies annual list, 28692, 43792, 46109

## FISH, FISHING

*See Fish and Wildlife Service.*
*Food and Drug Administration.*
*National Oceanic and Atmospheric Administration.*
*National Park Service.*

## FISH AND WILDLIFE SERVICE

### RULES

Alaska national wildlife monuments, 60257
Endangered and threatened species; fish, wildlife, and plants:
Antioch Dunes evening-primrose and Contra Costa wallflower; critical habitat, 39043
Arabis macdonaldiana et al., 44812
Boa and ground iguana; Mona Island, 4621
Crane, whooping; critical habitat, 20940
Duck, Mexican, 32261
Eagle, bald, 6233
Elephant, African, 20504
Leopard darter; Ark., Okla., 3715, 22042
Rattlesnake, New Mexican ridge-nosed, 34476
Snails, Eastern U.S. land, 28935
Snake, eastern indigo, 4028
Socorro isopod, 12690
Threatened species protection, 18181
Toad, Houston, 4025
Trout, greenback cutthroat, 16345
Trout, Little Kern golden, 15429
Turtle, leatherback sea; critical habitat, 43689, 45759
Turtles, loggerhead sea and green and olive ridley sea, 32800
Virginia round-leaf birch, Contra Costa wallflower, et al., 17916
Wolf, gray, 9612
Endangered and threatened species; fish, wildlife, and plants; list of species; annual publication, 968, 58031
Endangered species; interagency cooperation, 874
Fishing:
Arapaho National Wildlife Refuge, Colo., 3283, 54933
Arrowwood National Wildlife Refuge, N. Dak., 10929
Bear River Migratory Bird Refuge, Utah, 58190
Big Lake National Wildlife Refuge, Ark., 10929
Blackbeard Island and Savannah National Wildlife Refuges; correction, 10929, 15429
Blackwater National Wildlife Refuge, Md., 13577
Bowdoin National Wildlife Refuge, Mont., 16184
Browns Park National Wildlife Refuge, Colo., 54934
Catahoula National Wildlife Refuge, La., 10930
Charles M. Russell National Wildlife Refuge, Mont., et al., 36951
Charles Sheldon Antelope Range, Nev., et al., 55410
Chincoteague National Wildlife Refuge, Va., 13577
Choctaw National Wildlife Refuge, Ala., 10930
Colusa National Wildlife Refuge, Calif., et al., 55411
Crab Orchard National Wildlife Refuge, Ill., 6791
Delta National Wildlife Refuge, La., 10930
DeSoto National Wildlife Refuge, Iowa and Nebr., 60930
Dismal Swamp National Wildlife Refuge, Va., 13577
Erie National Wildlife Refuge, Pa., et al., 11823
Flint Hills National Wildlife Refuge, Kans., 36262
Great Meadows National Wildlife Refuge, Mass., et al., 12017
Holla Bend National Wildlife Refuge, Ark., 10931
Horicon National Wildlife Refuge, Wis., 13384
J. Clark Salyer National Wildlife Refuge, N. Dak., 15430
Kirwin National Wildlife Refuge, Kans., 57258
Lacassine National Wildlife Refuge, La., 10931
Lacreek National Wildlife Refuge, S. Dak., 5520, 32135
Lake Ilo National Wildlife Refuge, N. Dak., 18679, 41044
Lake Woodruff National Wildlife Refuge, Fla., et al., 3366
Long Lake National Wildlife Refuge, N. Dak., 10931
Mackay Island National Wildlife Refuge, N.C., 13577, 20236
Mattamuskeet National Wildlife Refuge, N.C., et al., 4434

Merritt Island National Wildlife Refuge, Fla., 28206
Mingo National Wildlife Refuge, Mo., 3565
National Elk Refuge, Wyo., 36460
Noxubee National Wildlife Refuge, Miss., 10932
Ouray National Wildlife Refuge, Utah, 54934
Pathfinder National Wildlife Refuge, Wyo., 3283, 54933
Pocasse National Wildlife Refuge, S. Dak., 28502, 59845
Quivira National Wildlife Refuge, Kans., 7647, 11823
Ravalli National Wildlife Refuge, Mont., 16502
Red Rock Lakes National Wildlife Refuge, Mont., 7647
Rice Lake National Wildlife Refuge, Minn., 12018
Sabine National Wildlife Refuge, La., 10932
Salinas Lagoon National Wildlife Refuge, Calif., 15629
Sand Lake National Wildlife Refuge, S. Dak., 59845
Seney National Wildlife Refuge, Mich., 54099
Sherburne National Wildlife Refuge, Minn., 14022
Squaw Creek National Wildlife Refuge, Mo., 7648
Swan Lake National Wildlife Refuge, Mo., 2726
Tamarac National Wildlife Refuge, Minn., 60278
Tewaukon National Wildlife Refuge, N. Dak., 20236, 54639
Union Slough National Wildlife Refuge, Iowa, 6952
Upper Mississippi River Wildlife and Fish Refuge, Ill., 38843
Upper Souris National Wildlife Refuge, N. Dak., 2633, 10369
Valentine National Wildlife Refuge, Neb., 59507
Wapanocca National Wildlife Refuge, Ark., 10932
White River National Wildlife Refuge, Ark., 10933

Hunting:
Agassiz National Wildlife Refuge, Minn., 41043
Alamosa National Wildlife Refuge, Colo., 39105, 39107
Ankeny National Wildlife Refuge, Oreg., et al., 36456
Aransas National Wildlife Refuge, Tex., 49539, 51025
Arapaho National Wildlife Refuge, Colo., 37699
Arrowwood National Wildlife Refuge, N. Dak., 40525, 40526, 40527
Audubon National Wildlife Refuge, N.Dak., 39585
Barnegat National Wildlife Refuge, N. J., 40022
Bear River Migratory Bird Refuge, Utah, 39584, 47977
Benton Lake National Wildlife Refuge, Mont., 37697
Big Lake National Wildlife Refuge, Ark., 36257
Big Stone National Wildlife Refuge, Minn., 39106
Bombay Hook National Wildlife Refuge, Del., 38408
Bosque del Apache National Wildlife Refuge, N. Mex., 49985
Bowdoin National Wildlife Refuge, Mont., 35487
Brigantine National Wildlife Refuge, N. J., 40021
Browns Park National Wildlife Refuge, Colo., 32426, 35320, 40023
Cabeza Prieta National Wildlife Refuge, Ariz., et al., 42258
Camas National Wildlife Refuge, Idaho, et al., 36459
Cape Romain National Wildlife Refuge, et al., S.C., 31337, 35488
Catahoula National Wildlife Refuge, La., 36253, 36257
Charles M. Russell National Wildlife Refuge, Mont., et al., 36950
Chase Lake National Wildlife Refuge, N. Dak., 40525, 40527
Chassahowitzka National Wildlife Refuge, Fla., et al., 34153
Chautauqua National Wildlife Refuge, Ill., 20990
Chincoteague National Wildlife Refuge, Va., 38839
Cibola National Wildlife Refuge, Calif., et al., 37698, 46030
Clear Lake National Wildlife Refuge, Calif., 32305
Conboy Lake National Wildlife Refuge, Wash., et al., 37700
Crab Orchard National Wildlife Refuge, Ill., 6790, 20989, 32426
Crescent Lake National Wildlife Refuge, Nebr., 23582
Des Lacs National Wildlife Refuge, N. Dak., 41043
DeSoto National Wildlife Refuge, Iowa and Nebr., 34480, 38705, 46032, 50184
Eastern Neck National Wildlife Refuge, Md., 38840
Erie National Wildlife Refuge, Pa., 38583
Eufaula National Wildlife Refuge, Ala., 33921
Eufaula National Wildlife Refuge, Ga., 36262
Fallon National Wildlife Refuge, et al., Nev., 32305, 44857
Fish Springs National Wildlife Refuge, Utah, 41404
Flint Hills National Wildlife Refuge, Kans., 36251, 36252, 36253
Great Swamp National Wildlife Refuge, N.J., 46029
Hatchie National Wildlife Refuge, et al., Tenn., 31339
Hillside National Wildlife Refuge, Miss., 33921, 36255, 36256, 36258
Holla Bend National Wildlife Refuge, Ark., 33922, 36253
Horicon National Wildlife Refuge, Wis., 32134, 32135
Iroquois National Wildlife Refuge, N.Y., 40022
J. Clark Salyer National Wildlife Refuge, N. Dak., 34151, 39799, 39800
Kirwin National Wildlife Refuge, Kans., 24696, 35488, 40232
Kofa National Wildlife Refuge, Ariz., et al., 44538, 49985
Lacassine National Wildlife Refuge, La., 36258
Lacreek National Wildlife Refuge, S. Dak., 45869
Lake Nettie National Wildlife Refuge, N. Dak., 39585
Lake Zahl National Wildlife Refuge, N. Dak., 38838, 41042
Long Lake National Wildlife Refuge, N. Dak., 40526
Lostwood National Wildlife Refuge, N. Dak., 38838, 41043
Mark Twain National Wildlife Refuge, Ill., 44538, 44540
Mark Twain National Wildlife Refuge, Iowa, 44540, 44541
Medicine Lake National Wildlife Refuge, Mont., 38011
Mingo National Wildlife Refuge, Mo., 3565, 39105, 43720
Missisquoi National Wildlife Refuge, Vt., 38410
Monte Vista National Wildlife Refuge, Colo., 38584
Montezuma National Wildlife Refuge, N.Y., 44856
Moosehorn National Wildlife Refuge, Maine, 38840
Muscatatuck National Wildlife Refuge, Ind., 47196
National Elk Refuge, Wyo., 38011
Necedah National Wildlife Refuge, Wis., 38841
Noxubee National Wildlife Refuge, Miss., 36254, 36257, 36259
Ottawa National Wildlife Refuge, Ohio, 20990
Ouray National Wildlife Refuge, Utah, 32427, 40524, 43462
Oxbow National Wildlife Refuge, Mass., 44856
Parker River National Wildlife Refuge, Mass., 38583
Pathfinder National Wildlife Refuge, Wyo., 46400
Pinckney Island National Wildlife Refuge, S.C., 44539, 47528
Pocasse National Wildlife Refuge, S. Dak., 38837, 38838
Presquile National Wildlife Refuge, Va., 38841
Prime Hook National Wildlife Refuge, Del., 37701
Quivira National Wildlife Refuge, Kans., 35486, 35487
Ravalli National Wildlife Refuge, Mont., 34156, 38010
Red Rock Lakes National Wildlife Refuge, Mont., 25823
Rice Lake National Wildlife Refuge, Minn., 38582
Sabine National Wildlife Refuge, La., 36259
Salton Sea National Wildlife Refuge, et al., Calif., 40867
Sand Lake National Wildlife Refuge, S. Dak., 38836, 38837
Seedskadee National Wildlife Refuge, Wyo., 36458, 41404, 41405
Seney National Wildlife Refuge, Mich., 34155, 34156, 36260
Sherburne National Wildlife Refuge, Minn., 20991, 35486
Shiawassee National Wildlife Refuge, Mich., 20989, 48649
Slade National Wildlife Refuge, N. Dak., 40526

Susquehanna National Wildlife Refuge, Md., 26024
Swan Lake National Wildlife Refuge, Mo., 39106
Swanquarter National Wildlife Refuge, N.C., 42260
Tamarac National Wildlife Refuge, Minn., 20989, 42764
Tewaukon National Wildlife Refuge, N. Dak., 43309
Upper Mississippi River Wildlife and Fish Refuge, Ill., Iowa, et al., 25825, 38842, 40023, 46548
Upper Souris National Wildlife Refuge, N. Dak., 42763
Valentine National Wildlife Refuge, Nebr., 40024, 46032
Wapanocca National Wildlife Refuge, Ark., 36260
Waubay National Wildlife Refuge, S. Dak., 31928
Wheeler National Wildlife Refuge, Ala., 36255, 36256
White Lake National Wildlife Refuge, N. Dak., 38838
White River National Wildlife Refuge, Ark., 36254, 36260, 36261
Yazoo National Wildlife Refuge, Miss., 36261
Marine mammals:
Otter, marine; designation, 13066
State laws and regulations, 45372
Migratory bird hunting:
Seasons, limits, and shooting hours, establishment, etc., 1093, 1799, 28499, 32098, 35901, 38010, 39288, 42962, 44537, 45588
Shotshells in non-toxic shot zones; prohibitions, 8145, 28206, 28501
Migratory bird permits:
Falconry, 10565, 57605
Falconry standards minimum compliance; list of States, 968, 34150
Migratory birds; list and definitions; correction, 10565, 14968
Organization and functions:
Law enforcement district offices; address; changes, 25823, 45370
Public access, entry, use, and recreation:
Back Bay National Wildlife Refuge, Va., 26315, 29296
Cabeza Prieta National Wildlife Refuge, Ariz., et al., 5517
Charles M. Russell National Wildlife Refuge, Mont., et al., 36949, 36950
Chincoteague National Wildlife Refuge, Va. et al., 10925
Cibola National Wildlife Refuge, Calif. et al., 34151
Crab Orchard National Wildlife Refuge, Ill., 6790
De Soto National Wildlife Refuge, Iowa and Nebr., 12017
Eastern Neck National Wildlife Refuge, Md., 9283
Iroquois National Wildlife Refuge, N.Y. et al., 10923
Kenai National Moose Range, Alaska, 22725
Kodiak National Wildlife Refuge, Alaska, 45374
Merritt Island National Wildlife Refuge, Fla., 48649
National Key Deer Refuge et al., Fla., 29563
Parker River National Wildlife Refuge, Mass. et al., 10926
Ruby Lake National Wildlife Refuge, Nev., 16983, 32133, 39799, 41042
Salinas Lagoon National Wildlife Refuge, Calif., 14477
Union Slough National Wildlife Refuge, Iowa, 6951
Upper Mississippi River Wildlife and Fish Refuge, Ill., 38835

**PROPOSED RULES**

Endangered and threatened species; fish, wildlife, and plants:
Alligator, American; La., 45512, 45513
Animal taxa, review of status, 16527
Beetles, North American, 35636
Butterflies or moths, certain; proposed threatened status or critical habitat, 28938
Cahaba shiner, spring pygmy sunfish, goldline darter, and pygmy sculpin; extension of time, 4872
Captive self-sustaining population for various species, etc.; advance notice, 16144
Chub, Virgin River, 37668
Colorado squawfish; critical habitat, 41060
Crane, whooping; critical habitat, 36588
Darter, goldline; correction and extension of time, 14697
Darter, Maryland; critical habitat, 20518
Duck, Mexican; deregulation, 13592, 21705
Elephant, African, 2193
Gambusia and salamander, San Marcos, 30316
Guanaco; inquiry, 12348
Lizard, Coachella Valley fringe-toed; proposed listing and critical habitat, 44806
Manatee, West African, 21338
Monkey, Rhesus macaque; Bangladesh, 15463
Pupfish, Leon Springs, Goodenough gambusia, and Devil's River minnow, 36117
Pupfish, Tecopa; deregulation, 28841
Rabbit, Ryukyu, etc., 16524
Salamander, Santa Cruz long-toes; critical habitat, 26759
Sea turtles, 12050, 12735, 13906
Shiner, Cahaba; correction and extension of time, 14697
State cooperative agreements, 38737
Sucker, razorback, 17375
Tortoise, Bolson, 43692
Tortoise, desert, 37662
Turtle, Hawksbill sea; critical habitat, 22224
Turtle, Illinois mud; critical habitat, 29152
Turtles, key mud and Plymouth red-bellied; critical habitat, 21702
Waccamaw darter, killifish, and silverside, Barrens topminnow, and Quachita madtom; critical habitat; extension of time, 13404
Wolf, Eastern timber, 29019
Wolf spider and amphipod, Kauai cave; critical habitat, 26084
Endangered species convention:
Aardwolf, African civet and honey badger, addition, 9628
Agenda items, development of U.S. position; meeting, 50928
Appendices change procedures, 12349
Fauna and flora, native; survey; inquiry, 9168
Lechwe and leopard, status review; advance notice, 18583
Native species list, status, 19176, 31183, 55314
Zebra, deer butterflys, etc..; advance notice, 36662
Fish and wildlife conservation in water projects; advance notice, 44870
Fish and wildlife restoration, financial assistance, cooperation with States, 38737
Hunting:
Aransas National Wildlife Refuge, Tex., 40893
Mingo National Wildlife Refuge, Mo., 30584
Pinckney Island National Wildlife Refuge, S.C., 34825
Susquehanna National Wildlife Refuge, Md., 9629
Migratory bird hunting:
Seasons, limits, and shooting hours; establishment, etc., 6275, 22421, 28012, 35890, 58845
Shotshells in non-toxic shot zones; prohibition, 28217
National Wildlife Refuge System; administrative provisions; land closure procedures, 37732
Public access, entry, use, and recreation:
Back Bay National Wildlife Refuge, Va., 10590
Merritt Island National Wildlife Refuge, Fla., 28017, 54963
Wildlife importation, exportation, and transportation, 12830, 37473, 40045

**NOTICES**

Channel modification in water resource projects; guidelines, 8276
Endangered and threatened species permits; applications, 40, 41, 42, 43, 1409, 2769, 2770, 2771, 2772, 3316, 3317, 3950, 3951, 3952, 4690, 4691, 5900, 5901, 6844, 6845, 7478, 7479, 7480, 8301, 8302, 8303, 9656, 9657, 10636, 10637, 10638, 11611, 11612, 11613, 12094, 12095, 13440, 14362, 14363, 15201, 15790, 15791, 16815, 16816, 17873, 18614, 18615, 19298, 19300, 19301, 20058, 20059, 20060, 20873, 22085, 22086, 23656, 24614, 25387, 25388, 26494, 26495, 28567, 28568, 29630, 29631, 30000, 30621, 30622, 30623, 32881, 32882, 32883, 34844, 34845, 34846, 36330, 36331, 36332, 37494, 37495, 39189, 39190, 39864, 40550, 43077, 45922, 45923, 55470, 56943, 56944, 58121, 58640, 58641, 60238, 60239, 60240
Environmental statements; availability, etc.:
Canaan Valley National Wildlife Refuge, W. Va., 13640
Federal aid in fish and wildlife restoration programs, 28568, 59913
Kealia National Wildlife Refuge, 11869
Kenai National Moose Range, Alaska, 8860
Mammalian predator damage management for livestock protection in western U.S., 55292
National Fish and Wildlife Health Laboratory, Wis., 2452
Floodplain management and wetlands protection; procedures, 24225
Marine mammal applications, etc., 9657, 12095, 25709, 28849, 30623, 34846, 36332, 37495, 37496, 37738, 40549, 43076, 56944, 60240
Marine mammals:
Annual report, availability, 5077

Marine turtles conservation; meeting, 24115
Meetings:
Canaan Valley National Wildlife Refuge, 14747
Migratory bird disease prevention contingency plan, 53064
Migratory bird hunting and conservation stamp (duck stamp) design contest; judging, 49370
National wildlife refuge study task force; report availability, 13102
Official insignia; issuance, 39444
Pipeline applications:
Aransas National Wildlife Refuge, Tex., 7479, 10981
Kenai National Moose Range, Alaska, 8860, 38120

## FLOOD ASSISTANCE

*See Engineers Corps.*
*Federal Disaster Assistance Administration.*
*Federal Insurance Administration.*

## FOOD AND DRUG ADMINISTRATION

### RULES

Administrative practices and procedures:
Fluorocarbons in self-pressurized containers; prohibition on use, 11316
Advisory committees established or terminated:
Anesthetic and Life Support Drugs Advisory Committee, 22674
Anti-Infective Agents Advisory Committee, 20488
Anti-Infective and Topical Drugs Advisory Committee, 18661
Antiperspirant Drug Products Review Panel, 18661
Bacterial Vaccines and Bacterial Antigens Review Panel, 28458
Cardiovascular Device Classification Panel, 22674
Circulatory Devices Panel, 22674
Clinical Chemistry and Hematology Devices Panel, 21668
Controlled Substances Advisory Committee, 28457
Dermatology Advisory Committee, 18661
Drug Abuse Advisory Committee, 28457
FDA/NIDA Drug Abuse Research Advisory Committee, 28457
General Hospital and Personal Use Device Classification Panel, 22673
General Medical Devices Panel, 22673
Immunology and Microbiology Devices Panel, 22672
Immunology Device Classification Panel, 22672
Microbiology Device Classification Panel, 22672
Obstetrical-Gynecological Device Classification Panel, 22673
Obstetrics-Gynecology and Radiologic Devices Panel, 22673
Ophthalmic; Ear, Nose, and Throat; and Dental Devices Panel, 21667
Ophthalmic Drugs Advisory Committee, 18661
Pathology Device Classification Panel, 22672
Radiological Device Classification Panel, 22673
Respiratory and Nervous System Devices Panel, 21668
Surgical and Rehabilitation Devices Panel, 21667
Urological Device Classification Panel, 22673
Animal drugs, feeds, and related products:
Amoxicillin tablets, 24011
Amoxicillin thihydrate, sterile, 38000
Amoxicillin trihydrate oral suspension, 4601, 11700, 16312
Ampicillin sodium for aqueous injection, 8
Ampicillin trihydrate suspension, sterile, 4602
Amprolium, 4006
Amprolium, ethopabate, bacitracin, and roxarsone, 30275, 35686
Amprolium and bacitracin zinc, 53716
Anhydrous ammonia, 33707
Antibiotic sampling procedure, 41197
Antibiotics, nitrofuran, and sulfonamides; correction, 29290
Arsenamide sodium aqueous injection, 27785
Bacitracin methylene disalicylate and streptomycin sulfate oral powder, 48997, 59059
Bambermycins, 46301, 54240
Bambermycins-containing products; sponsors, 9803
Butamisole hydrochloride, 15625, 60883
Caramiphen ethanedisulfonate and ammonium chloride tablets, 55385
Carcinogenic residues in edible animal products; assay evaluation procedures, revocation, 22675
Cephapirin benzathine, 37174
Chlorothiazide tablets and boluses, 39085
Cyclothiazide tablets, 28459
Decoquinate, 32750
Dexamethasone injection, 16973
Dexamethasone sterile solution, 57600
Dichlorophene and toluene capsules, 35685
Diethylcarbamazine citrate syrup, 10553
Diethylcarbamazine citrate tablets and chewable tablets, 4601, 6940, 6941
Drug applications; reinstatement provisions, 1941
Febantel paste, 8797, 12311, 60882
Fenbendazole suspension; correction, 12311
Ferrous fumarate, 55386
Fluorocarbons in self-pressurized containers; prohibition on use, 11317
Furosemide powder, 14647
Furosemide syrup, 11177
Gentamicin sulfate injection, 1941, 4976
Glycobiarsol tablets, 30274
Gonadorelin diacetate tetrahydrate injection, 9804
Good manufacturing practices, veterinary drugs, 45076
Griseofulvin, 28458
Haloxon drench; correction, 1941
Hemicellulose extract, 11181
Hydrochlorothiazide injection, 59058, 59837
Imidocarb dipropionate, 40455
Isoflupredone acetate; generic drug name change, 18172
Lasalocid sodium, 52701
Lasalocid with bacitracin, 17469
Lasalocid with roxarsone, 19844
Lenperone hydrochloride injection and tablets; revocation of certain regulations, 60883
Levamisole hydrochloride, 39351
Levamisole phosphate injection, 20489, 29289, 60895
Levamisole resinate, 18171
Levamisole-containing products; sponsor name change, 11175, 11176
Lidocaine hydrochloride injection with epinephrine, 46300, 59059
Mebendazole oral powder, 35686
Methylene blue, drugs containing, 9803, 12310
Methylprednisolone acetate suspension, sterile, 59058
Mibolerone drops, 15625
Monensin, 4977, 27786, 28459, 32749, 56223
Monensin, bacitracin methylene disalicylate and roxarsone, 32750
Neomycin sulfate, hydrocortisone acetate, sterile ointment, 40456
Neomycin sulfate sterile solution, 48996, 59059
Neomycin-sulfacetamide ophthalmic ointment, 11176
Nequinate, 8134
Nicarbazin, 1942, 57601
Nonclinical laboratory studies, good laboratory practice, 60023
Novobiocin oil suspension, 10554
Nystatin-neomycin-thiostrepton-triamcinolone acetonide ointment, 29770
Oxytetracycline hydrochloride injection, 58083
Pancreatic dornase, 27786
Penicillin and procaine penicillin G aqueous suspension (injectable), 32748, 46529
Penicillin and procaine penicillin G novobiocin infusion, 52701
Penicillin G procaine, 11700, 14008
Penicillin streptomycin and dihydrostreptomycin powder; antibiotic certification revoked, 6942
Piperazine phosphate capsules, 6941, 9804
Piperazine phosphate-thenium closylate tablets, 32747
Prednisolone sodium phosphate injection, sterile, 29769
Primidone tablets, 55386
Procaine penicillin G in oil, 8134
Promazine hydrochloride tablets, 55386
Pyrantel pamoate tablets, 52700
Salicylic acid; sponsor listing, 29290
Selenium disulfide suspension, 29290, 48997, 49534, 59059
Spectinomycin injection, 9273
Sponsor address change; Evsco Pharmaceutical Corp., 11699
Sulfachlorpyridazine, 36622
Sulfamethazine-containing drugs, 19385
Sulfisoxazole tablets, 60895
Tetracycline and bulk antibiotic drugs, 11177, 14647
Tolnaftate, 29289
Triamcinolone acetonide suspension, sterile, 4976
Trichlorfon paste, 39084
Tylosin, 4977, 27786, 32746, 39086, 58082
Tylosin and sulfamethazine, 14648, 34457
Uredofos tablets, 4975, 12311
Uredofos tablets; sponsor change, 32747
Virginiamycin, 41966
Whey, fermented ammoniated condensed, 33708
Bakery products:
Identity standards, 47177
Iron fortification; stayed provisions withdrawn, 38578

Raisin bread, enriched; identity standards; revocation of stayed regulations, 43456
Biological products:
Blood, whole, and components for transfusion; donor classification labeling requirements, 2147
Blood and blood products; standards; anticoagulant citrate phosphate dextrose adenine solution, 34459
Blood and blood products; standards; source plasma (human), donor plasmapheresis, 9805, 12311
Blood products establishments; medical device listing, 37997
Dating periods for specific products, 4007
Diagnostic standards; blood grouping serum; correction, 19845, 29291
Diagnostic substances for laboratory test standards; reagent red blood cells, 10554, 13504
Licensing; biological products review panel reports; extension of comment period, 44838
Nonclinical laboratory studies, 60024
Sterility test by membrane filtration, 47182
Cereal flours and related products:
Iron fortification; stayed provisions withdrawn, 38578
Color additive petitions:
Nonclinical laboratory studies, 60020
Color additives:
Bismuth citrate, 44831
Bronze and copper powder; correction, 1490
Carcinogenic additives in animal feed; revocation, 22675
D&C Blue No. 6; effective date confirmed, 11149
D&C Orange No. 4; effective date confirmed, 14642
D&C Red No. 34, 4974
Ferric ammonium ferrocyanide; effective date confirmed, 6939
Ferric ferrocyanide (iron blue), 36063, 54235, 54237
Lead acetate; closing date postponed, 4596, 8793
Color additives, provisionally listed, for food, drugs, and cosmetics; closing dates postponed, 14643
Conduct standards; FDA supplement, 7619
Cosmetics:
Fluorocarbons in self-pressurized containers; prohibition on use, 11317
Labeling claims, use of "hypoallergenic"; revoked, 10559, 13504
Dietary foods; label statements for weight control or diabetic diets, 43248, 52700, 60894
Dressing, sour cream; identity standard revoked, 11150
Dressing, sour half-and-half; identity standards; removed, 44833
Drug labeling:
Prescription drug dispensing container requirements, 37985
Thyroid, digitalis, and related drugs for human use; obesity treatment warnings, 22009
Drug producers registration and listing of drugs in commercial distribution; medical device listing, 37997
Drug producers registration and listing of drugs in commercial distribution; NDC codes, 24010
Environmental impact considerations:
Intraocular lenses; investigational device exemptions; correction, 1940
Medical devices, exemptions from Federal preemption; State and local requirements, 18664, 22675
Food additives:
N-Acetyl-L-methionine, 27784
Adhesive coatings, 16972
Adhesive coatings and components; polyoxyethylene (20 moles) lanolin, 22676
Allyl methacrylate, 54927
Antioxidants; adhesive coatings, adjuvants, etc., 2873
Antioxidants and stabilizers for polymers, 1941, 16972, 47723, 59056
Beeswax, 14644
Chemicals used in flume water for washing sugar beets, 54926
Defoaming agents, 2872
Dimethylolpropionic acid, 49534
Emulsifier/surfactant in food-contact applications, 58557
Emulsifiers, 2871
Ethylene-vinyl acetate copolymers; use of xanthan gum, 29287
Ethylene-vinyl acetate-vinyl alcohol copolymers in contact with fatty foods, 2874
Fluorocarbons in self-pressurized containers; prohibition on use, 11317, 14644
Food starch-modified, 11697
Nonclinical laboratory studies, 60021
Paper and paperboard components; aqueous and fatty foods, 2393, 45556
Perfluorocarbon resins, 44834
Poly-oxyalkylene glycols and glycol ethers; lubricants with incidental food contact, 54928
Polyoxymethylene homopolymer, 44835
Resinous and polymeric coatings, 2873, 6216, 11697
Sanitizing solutions; use of adjuvant in; correction, 1941
Selenium, 11701
Sodium lauryl sulfate, 18668
Sodium salt; 2-sulfoethyl methacrylate, 7206
Sorbose, 11698
Styrene block polymers; correction, 1941
Sulfosuccinic acid 4-ester with polyethylene glycol dodecyl ether disodium salt, 16311
Trifluoromethane sulfonic acid, 54237
Food for human consumption:
Fluorocarbons in self-pressurized containers; prohibition on use, 11317
Reorganization and recodification; correction, 1941
Food labeling:
Bakery products; ingredient labeling exemptions, 24519
Fats and oils; substitution of "hydrogenated" for "saturated", 12858
Regulations, mandatory uniform effective date, 44830
Saccharin and its salts; warning statement requirements, 8795
Frozen desserts; ice milk, milk-derived ingredients, etc.; identity standards, 4598, 19384
Fruit juices, canned; identity standards, 45556
Lemonade and colored lemonade, frozen concentrate; effective date partially confirmed; provision stayed, 11695
GRAS or prior-sanctioned ingredients:
Aconitic acid, 47724
Beeswax, 14644
Bile salts and ox bile extract, 36064
Caprylic acid, 19843
Cocoa butter substitute from palm oil, 54239
Dextrans (average molecular weight below 100,000), 29288
Potassium iodine and potassium and calcium iodates, 11699, 14008
Rue, 3705
Sodium thiosulfate, 22938
Hearings, public:
Nonclinical laboratory studies, 60013
Hearings, public, before advisory committees; establishment or terminations, etc.:
Biometric and Epidemiological Methodology Advisory Committee; termination, 3704
Cardiovascular and Renal Drugs Advisory Committee, 31318
Dental Drug Products Advisory Committee; termination, 3704
Endocrinologic and Metabolic Drugs Advisory Committee, 31318
Fertility and Maternal Health Drugs Advisory Committee, 31319
Hemorrhoidal Drugs Review Panel, 44831
Internal Analgesic Panel, 47723
Peripheral and Central Nervous System Drugs Advisory Committee, 31320
Phychopharmacologic Drugs Advisory Committee, 31319
Pulmonary-Allergy Drugs Advisory Committee, 31320
Radiopharmaceutical Drugs Advisory Committee, 31319
Skin Test Antigens Review Panel; terminated, 6937
Topical Analgesic Panel; termination, 45555
Toxicology Advisory Committee, 30271
Vitamin, Mineral, and Hematinic Drug Products Review Panel; termination, 11149
Hearings, public, before Commissioner:
Medical devices, exemptions from Federal preemption; State and local device requirements, 18664
Human drugs:
Anesthetic drug products, inhalation; carcinogenic and teratogenic potential studies; extension of submission date, 10553
Antibiotic drugs, certification; technical changes, 9800
Antibiotic drugs for parenteral use; packaging; correction, 9802
Antibiotic reference standards; availability, 41195
Antibiotic sampling procedure, 41197
Antibiotic-containing ophthalmic combination drugs; certification revocation; correction, 1941
Cefadroxil capsules, 20976, 27180
Cephradine, sterile, 14646
Chloramphenicol ophthalmic solution, 59057
Doxorubicin hydrochloride; high-pressure liquid chromatographic assay, 44836
Fluorocarbons in self-pressurized containers; prohibition on use, 11317
Good manufacturing practices, 45076, 46528
Griseofulvin tablets; dosage size certification, 22676

Isopropyl myristate sterility test, 43457
Methadone; relationship between Federal narcotic treatment programs and State authorities, 6940
Microdilution minimal inhibitory concentration panels, 9792, 12858, 16312
Natamycin, 55382
Neomycin; hypersensitivity testing, 11150
Neomycin palmitate-trypsin-chymotrypsin concentrate lotion; certification revocation, 9801, 9802, 26428
New drug applications; filing over protest procedures; correction, 8797
Nonclinical laboratory studies, 60021
Nystatin vaginal dosage forms, 43458
Oral contraceptives; expanded label requirements, 4220, 7618
Parenteral drugs, large volume, in plastic containers; compatibility studies, 58562
Penicillin, 2393, 3705, 9799
Prescription drug dispensing container requirements, 37989
Progestational drug products; patient labeling requirements, 47181
Radioactive drugs, 14646
Tetracycline, 11151, 34456, 50677
Tetracycline hydrochloride for topical solution; correction, 3705
Vitamins A and D; certain requirements revoked, 10552
Information, public:
Classification procedures, medical devices, 32993
Macaroni products, enriched; identity standard; effective date stayed, 11695
Medical devices:
Classification procedures, 32993
Exemptions from Federal preemption; State and local device requirements, 18665, 22010
Fluorocarbons in self-pressurized containers; prohibition on use, 11318
Good manufacturing practices, 31527, 52701
In vitro diagnostic products for human use; good manufacturing practices compliance, 31527, 52701
Intraocular lenses; investigational device exemptions; correction, 1940, 6216, 12311
Listing procedures, 37997
Milk, evaporated, sweetened condensed, etc.; identity standards, 21670, 44832
Milk, nonfat dry, lowfat dry, dry whole, and dry cream; identity standards, 19835, 29769, 36622
Nonclinical laboratory studies, good laboratory practice, 60013
Organization and authority delegations:
Associate Commissioner et al.; certification of true copies and use of seal, 29285, 46299
Associate Commissioner et al.; disclosure of official records, 29286
Associate Commissioners et al.; service fellowships, 29285
Biologics Bureau, Associate Director for compliance, 36060
Bureau Directors et al.; grant applications, 32746
Commissioner; appeal authority etc., 58556
Commissioner; lead-based paint poisoning prevention, 22672
Deputy Commissioner et al., 20487
Drugs Bureau Director et al.; insulin, 20487
Enforcement activities, 30797
Management and Data Systems, Chief; disclosure of official records, 51759
Medical Devices Bureau, Director; investigational device exemptions, 22006
Regional Food and Drug Directors, et al.; diagnostic x-ray systems, 7618, 11695
Veterinary Medicine Bureau, Director, et al.; minor violations report issuance, 11694
Pies, frozen; ready-to-eat, and gelatin; quality standards withdrawn, 9272
Pineapple juice, canned; identity and quality standard; effective date confirmed and stay of provision, 10552
Product recalls; policies and procedures, 26218
Protein supplements used in weight control; warning label requirements; interim rule and inquiry, 60893
Radiological health:
Laser products; performance standards; emission and labeling requirements, 55387
Nonclinical laboratory studies, 60024
Ultrasonic therapy and surgery products; performance standards, 7166
X-ray systems; performance standards, 19879
Regulatory hearing before FDA:
Classification procedures; medical devices, 32993
Shrimp, canned; identity and fill of container standards, 19840, 25423
Strawberries, frozen; identity and quality standards; correction, 19864
Tea importation; standards, 46301
Tomato juice, tomato concentrates, and catsup; identity and quality standards, 19864
Tomatoes, canned; identity and quality standards; correction, 12858
Tomatoes, canned; identity and quality standards; effective date confirmed, 30274, 54925
Vitamins A and D; certain requirements revoked, 10552

**PROPOSED RULES**

Administrative practices and procedures:
General revision, 51966
Separation of functions and ex parte communications; withdrawn, 25438
Administrative rulings and decisions:
Recall effectiveness study; availability, 14674
Animal drugs, feeds, and related products:
Applications, supplemental drug; approval; extension of time, 9829
Bacitracin and bacitracin-containing drugs, 25444, 29316, 35731, 36645
Chlortetracycline hydrochloride-neomycin tablets, 30808
Chlortetracycline-sulfamethazine tablets, 43036
Clinical investigators, obligations, 35210, 46322, 52731
Confidentiality of data and information; public disclosure, 12869, 16997, 23006
Export of new drugs for investigational use, 1100
Good manufacturing practices; exemptions for OTC drug products, 45088
Good manufacturing practices; medicated feed articles, 2526, 8158, 13585
Injectable animal drugs, sterility and pyrogenicity; inquiry, 58591
Medicated feed articles; definitions and considerations, 2526, 8158, 13585
Oxytetracycline hydrochloride capsules, 43468
Penicillin and tetracycline (chlortetracycline and oxytetracycline), 1966, 3032, 5010, 11716, 16997, 35059, 46322
Teat dips; articles used on bovine dairy animals; extension of time, 4637
Tetracycline tablets and capsules, 43468
Asparagus; identity and quality standards, 58580
Bakery products; identity standards, 22728, 22785
Biological products:
Allergenic products; maximum volume limit in multiple dose container, 30302
Allergenic products, source material criteria, 43472
Blood and blood component facilities; good manufacturing practices; recordkeeping requirements; withdrawn, 59098
Blood and blood products; standards; anticoagulent citrate phosphate dextrose adenine solution, 2890
Blood group substances A, B, and AB; standards, 11716, 14683
Clinical investigations, institutional review boards; standards, 35186, 58574
Clinical investigators, obligations, 35210, 52731
Confidentiality of data and information; public disclosure, 12869, 16997, 23006
Limulus amebocyte lysate; additional standards for manufacture, 35731
Bioresearch monitoring program; clarification, 43468
Cheeses and related cheese products:
Blue, cheddar, edam, etc.; identity standards; international, 42127, 59093
Cheese substitutes; identity standards, 42118
Pasteurized process cheese; identity standards; reopening of comment period, 42127, 59094
Skim milk cheese; identity standards; reopening of comment period, 42126, 59095
Sorbic acid and its salts; GRAS status, 9823, 13584
Substitutes; identity standards; reopening of comment period, 59093
Clinical investigations:
Institutional review boards, standards, 35186, 58574
Investigators, obligations, 35210, 52731
Color additive petitions:
Clinical investigations, institutional review boards; standards, 35186, 58574
Clinical investigators, obligations, 35210, 52731
Color additives:
Ferric ammonium ferrocyanide, 36110, 42017
Orange B; termination, 45611, 56906
Color additives, provisionally listed, for food, drugs, and cosmetics; postponement of closing dates; correction, 3287

Cosmetics:
Hair dyes, coal tar; warning statement, 1101, 1966, 9830, 19423, 24070
Labeling, ingredient; correction, 4638
Dietary foods; reduced calorie labeling for bread, 43261
Dressing, sour half-and-half; identity standard repeal, 11226
Drug labeling:
Manufacturer's name designation requirements, 45614
Proprietary and established names on prescription drug labels, etc.; withdrawn, 25142
Drug producers registration and listing of drugs in commercial distribution:
Medicated feed articles, 2526, 8158, 13585
Drug producers registration and listing of drugs in commercial distribution; manufacturer's name designation requirements, 45614
Enforcement policy:
Adverse findings and regulatory letters; practice and procedures, 27498
Criminal violation report, prior opportunity for presentation of views, 20508
Food additives:
Clinical investigations, institutional review boards; standards, 35186, 58574
Clinical investigators, obligations, 35210, 46322, 52731
Gum guaiac, 32819
2-Nitropropane, 56247
Petitions; procedural regulations; terminated, 15164
Poisonous or deleterious substances; aflatoxins in shelled peanuts and peanut products; reopening; extension of time, 16349
Zinc-silicon dioxide matrix coatings; withdrawn, 7652
Food for human consumption:
Poisonous or deleterious substances; aflatoxins in shelled peanuts and peanut products; reopening, 8808
Saccharin; warning statements on vending machines, 5851, 45613
Food labeling:
Bakery products; ingredient labeling exemptions, 14677
Filled milk products; common name, establishment; withdrawal, 42118
Firming agents; ingredient labeling exemption, 16347, 20510, 22730
Fruits and vegetables, canned; drained or fill weight; correction, 2889
Nutrient enrichment ingredients; ingredient labeling exemptions, 14675
Protein supplements used in weight control; warning label requirements; correction, 3287
Fruit butters, jellies, preserves, and related products:
Sorbic acid and its salts; GRAS status, 9823, 13584
Fruits, canned; label statements, drained or fill weight; correction, 2889
Grapefruit juice; identity and fill of container standards, 58575
GRAS or prior-sanctioned ingredients:
Aconitic acid, 10577
Algae, brown and red, 34500, 50700
Alginates, 3725, 8808, 13584
Ammonium bicarbonate, ammonium carbonate, ammonium chloride, ammonium hydroxhide, and mono- and disbasic ammonium phosphate, 14064, 18699
Bile salts and ox bile extract, 4062, 11227
Carbonates and bicarbonates, 25438, 35731
Dextrans (average molecular weight below 100,000); correction, 2408
Fish oils, hydrogenated, 30300, 36644, 43036
Gelatin; correction and extension of time, 1509, 2890
Gum guaiac, 32819
Hypophosphites, 46550
Inositol, 22056, 25438
Papain, 31349
Pectins, 38591
Propyl gallate, 19422
Sorbic acid and its salts, 9823, 13584
Stannous chloride, 6242, 7652
Succinic acid, 4635, 8808
Sulfuric acid, and ammonium, calcium, potassium, and sodium sulfates, 12874, 16996
Tall oil, 24067, 30808
Tocopherols and derivatives, 50193, 60176
Hearings, public:
Clinical investigations, institutional review boards; standards, 35186, 58574
Clinical investigators, obligations, 35210, 52731
General revision, 51966
Medical devices; investigational device exemption procedures; extension of time, 46321
Medical devices; procedures for development of standards, 32266, 50700
Human drugs:
Antibiotic, foreign new drug applications; definition of "United States"; withdrawn, 25443
Antibiotic drugs; batch certification, analytical data submission; correction, 3729
Antibiotic-containing griseofulvin, 22730, 30302, 40038
Antifungal antibiotic drugs; griseofulvin content, 22730, 30302
Bacitracin and bacitracin-containing drugs, 25444, 29316
Chloramphenicol ophthalmic solution, 11715
Chlorofluorocarbon propellants in self-pressurized containers, use in interactal steroid foam drug products, 57617
Clinical investigations, institutional review boards; standards, 35186, 58574
Clinical investigators, obligations, 35210, 52731
Colistimethate sodium, sterile, 11714, 14683, 15734
Confidentiality of data and information; public disclosure, 12869, 16997, 23006
Contact lenses; marketing, 1966
Drug product marketing approval; separation of functions in evaluating requests for hearing, elimination, 59095
Estrogenic, oral contraceptive, and progestational drug products; patient labeling requirements, 47198
Estrogens to treat postpartum breast engorgement, 56906
Ethylene oxide, ethylene chlorohydrin, and ethylene glycol; maximum residue limits and exposure levels; inquiry, 3800, 27474, 30808, 36644
Foreign new drug applications; definition of "United States"; withdrawn, 25443
Good manufacturing practices; exemptions of OTC drug products, 45088
Hypoglycemic drugs, oral; labeling, 52732
Insulin, foreign new drug applications; definition of "United States"; withdrawn, 25443
Insulin products; certification requirements, 13585
Insulin products, 80-unit; certification discontinued, 32821
Isopropyl myristate; ophthalmic ointment sterility testing, 7653, 11714
Labeling; manufacturer's name designation requirements, 45614
Narcotic drugs other than methadone, clinical standards and conditions for use in narcotic treatment programs; correction, 3728
New drug applications; abbreviated forms, use, 39126
Over-the-counter drugs; antimicrobial products, topical; monograph establishment, 1210, 4637
Over-the-counter drugs; antiperspirant drug products; monograph establishment, 46694, 51806, 60957
Over-the-counter drugs; emetic products; monograph establishment, 39544, 55417
Over-the-counter drugs; internal analgesic, antipyretic and antirheumatic products; monograph establishment; extension of time, 1100
Over-the-counter drugs; nighttime sleep-aid and stimulant products, 25544
Over-the-counter drugs; skin bleaching products; monograph establishment, 51546
Over-the-counter drugs; skin protectant drug products; labeling, 34628
Over-the-counter drugs; skin protectant drug products; monograph establishment, 42018
Over-the-counter drugs; sunscreen products; monograph establishment, 38206, 56249, 58097, 60957
Over-the-counter drugs; topical optics; establishment of monograph; correction, 58097
Oxytetracycline hydrochloride capsules, 43468
Procainamide hydrochloride, bioequivalence requirements, 35056, 46322
Quatenary amines, residual; tests; withdrawn, 21014
Tetracycline, concentrated liquid dosage forms; certification revocation, 21694
Tetracycline; standard response line concentration, 44864, 56249
Tetracycline tablets and capsules, 43468
Tricyclic antidepressants; bioequivalence requirements, 6965, 11227
Human subjects, protection; prisoner rights and safety, 19417
Information, public:
Medical devices; investigational device exemption procedures, 20726, 25142, 29804, 35056, 46321
Medical devices; procedures for development of standards, 32267, 50700
Lemon juice; canned; identity standards and fill of container requirements, 14678, 24547

Margarine:
Sorbic acid and its salts; GRAS status, 9823, 13584
Medical devices:
Confidentiality of data and information; public disclosure, 12869, 16997, 23006
Device listing procedures; correction, 1106
Ethylene oxide, ethylene chlorohydrin, and ethylene glycol; maximum residue limits and exposure levels; inquiry, 3800, 27474, 30808, 36644
Good manufacturing practices; meetings, 9320
Hearing aids; exemption from preemption of State and local requirements, 33180, 43037, 49014, 49015, 60176
In vitro diagnostic products for human use; procedures for development of standards, 32267
Investigational device exemption procedures, 20726, 25142, 29804, 35056, 46321
Lenses, impact-resistant, in eyeglasses and sunglasses; testing methods, 1106, 18699
Procedures for development of standards, 32264, 50700
Public information; disclosure of applications, 13587
Medical devices, neurological; classification, 55640
Alpha monitor, 55662
Aneurysm clip, 55703
Aneurysm clip applier, 55677
Artificial embolization device, 55730
Ataxiagraph, 55646
Aversive conditioning device, 55705
Biofeedback device, 55699
Bite block, 55700
Burr hole cover, 55706
Carotid artery clamp, 55701
Central nervous system fluid shunt and components, 55714
Clip forming/cutting instrument, 55678
Clip rack, 55679
Clip removal instrument, 55678
Cortical electrode, 55649
Cottonoid paddie, 55692
Cranial electrotherapy stimulator, 55716
Cranioplasty material forming instrument, 55687
Cranioplasty plate fastener, 55712
Cryogenic surgical device, 55680
Cutaneous electrode, 55650
Depth electrode, 55650
Dowel cutting instrument, 55680
Drill handpiece (brace), 55683
Dura substitute, 55728
Echoencephalograph, 55647
Electric drill motor, 55684
Electroconductive media, 55648
Electroconvulsive therapy device, 55729
Electroencephalogram (EEG) signal spectrum analyzer, 55654
Electroencephalograph, 55653
Electroencephalograph electrode/lead tester, 55653
Electroencephalograph test signal generator, 55655
Esthesiometer, 55657
Evoked response auditory stimulator, 55672
Evoked response electrical stimulator, 55669
Evoked response mechanical stimulator, 55670
Evoked response photic stimulator, 55671
External functional neuromuscular stimulator, 55718
Galvanic skin response measurement device, 55658
Implanted cerebellar stimulator, 55718
Implanted diaphragmatic/phrenic nerve stimulator, 55719
Implanted intracerebral/subcortical stimulator for pain relief, 55720
Implanted malleable clip, 55704
Implanted neuromuscular stimulator, 55722
Implanted peripheral nerve stimulator for pain relief, 55724
Implanted spinal cord stimulator for bladder evacuation, 55721
Implanted spinal cord stimulator for pain relief, 55725
Intracranial pressure monitoring device, 55662
Intravascular occluding catheter, 55700
Lesion temperature monitor, 55713
Leukotome, 55691
Manual drill, burr, trephine, and accessories, 55681
Manual rongeur, 55695
Methyl methacrylate for aneurysmorrhaphy, 55697
Methyl methacrylate for cranioplasty, 55708
Microsurgical instrument, 55688
Nasopharyngeal electrode, 55651
Needle electrode, 55652
Nerve conduction velocity measurement device, 55659
Nerve cuff, 55707
Neurological endoscope, 55656
Neurosurgical chair, 55676
Neurosurgical head holder (skull clamp), 55687
Neurosurgical headrest, 55686
Neurosurgical suture needle, 55691
Nonpowered neurosurgical instrument, 55689
Nystagmograph, 55655
Ocular plethysmograph, 55665
Percussor, 55664
Physiological signal amplifier, 55667
Physiological signal conditioner, 55668
Physiological signal telemetry system, 55668
Pinwheel, 55664
Pneumatic drill motor, 55685
Powered compound drill, burr, trephine, and accessories, 55682
Powered direct-contact temperature measurement device, 55661
Powered rongeur, 55695
Powered simple drill, burr, trephine, and accessories, 55682
Preformed alterable cranioplasty plate, 55709
Preformed craniosynostosis strip, 55727
Preformed nonalterable cranioplasty plate, 55711
Radiofrequency lesion generator, 55685
Radiofrequency lesion probe, 55693
Rheoencephalograph, 55666
Rigidity analyzer, 55645
Scalp clip, 55676
Self-retaining retractor, 55694
Shunt system implantation instrument, 55689
Skin potential measurement device, 55660
Skull plate anvil, 55674
Skull punch, 55693
Skull tong for traction, 55731
Skullplate screwdriver, 55696
Sponge for internal use, 55697
Stereotaxic instrument, 55690
Transcutaneous electrical nerve stimulator for pain relief, 55726
Tremor transducer, 55673
Tuning fork, 55658
Two-point discriminator, 55646
Ultrasonic scanner calibration test block, 55672
Ventricular cannula, 55674
Ventricular catheter, 55675
Milk and cream:
Substitutes; identity standards; reopening of comment period, 59093
Milk and cream; identity standards, 42118
Orange juice and concentrated orange juice with preservative; identity standards; correction, 1509
Pears, canned; quality standards, 32143, 39126
Radiological health:
Clinical investigations, institutional review boards; standards, 35186, 58574
Clinical investigators, obligations, 35210, 52731
Diagnostic radiology facilities; quality assurance programs, 18207
Diagnostic X-ray equipment; partial withdrawal, 43473
Human food and animal feeds, accidental radioactive contamination; recommendations for State and local agencies, 58790
Ionizing radiation therapy for benign diseases; inquiry, 6244
Mercury vapor lamps; performance standards, 16997, 19423
Sunlamp products; performance standards; corrections, 4871, 5852
X-ray intensifying screens; radiation protection recommendation; advance notice, 24066
X-ray systems, diagnostic; performance standards, 7654, 30303
Recombinant DNA research; advance notice, 60134
Regulatory hearings:
Clinical investigations, institutional review boards; standards, 35186
Clinical investigators, obligations, 35210
Medical devices; investigational device exemption procedures, 20726, 25142, 29804, 35056
Strawberries, frozen; identity and quality standards, 16991
Tomato juice, tomato concentrates, and catsup; identity and quality standards, 26454, 30299
Vegetable protein products; common or usual names, 30472, 43035

NOTICES

Advisory committees; annual reports filed, availability, 52774
Animal drugs, feeds, and related products:
Aflatoxin-contaminated corn, blending prohibition; limited exemption, 14122
Animal waste, recycled, use as animal feed; inquiry, 5068, 32867

Arecoline-base drugs, 10622, 12950
Arsenamide sodium solution; approval withdrawn, 27898
Bio-dex 100, approval withdrawn, 56277
Bon-Premix Medicated; approval withdrawn, 2941
Boost-O-Iron; approval withdrawn, 55465
Carbocaine-V HC1 with suprarenin; approval withdrawn, 9867
Chlortetracycline, sulfamethazine, and vitamin tablets; proposed withdrawal; hearing, 43070
Chlortetracycline-neomycin oblong tablets, 30895
Combination drugs, availability of guidelines and meeting, 46375
Cumol; approval withdrawn, 29833
Dihydrostreptomycin, injectable; efficacy study, hearing, 27894
Dihydrostreptomycin sulfate; approval withdrawn, 56280
Doboy Tylan/Sulfa 10 Premix; approval withdrawn, 14739, 26131
Dornavac; approval withdrawn, 27898
Dr. Hess, SQX (sulfaquienoxaline); approval withdrawn, 57658
Feeds containing new drugs; applications, 32866, 51450
Formica premixes; approval withdrawn, 17054
Iron hexanehexol; approval withdrawn, 14738
Lenperone hydrochloride (Elanone-V) injection and tablets; approval withdrawn, 61007
Life-Iron; approval withdrawal, 28553
Medicated feeds; task force report, availability, 58634
Mercaptocaine creme; approval withdrawn, 35749
Neomycin-sulfonamide-kaolin-pectin tablets; approval withdrawn, 30354
Nitrite, dietary animal study; availability, 36697
Penicillin-streptomycin-vitamin soluble powder; approval withdrawn, 7040, 9861
Penicillin-tetracycline premixes; hearing, 53827
Phenothiazine; proposed withdrawal, hearing, 10620, 12941
Pig ration ban-250; hearing, 56278
Predsem (prednisone) injectable; approval withdrawn, 26131
Rootin' Iron Blocks (ferrous fumarate); approval withdrawn, 52774
Selenium in dairy and beef cattle feed, 14736
Statyl premixes; approval withdrawn, 8182
Sulfanitran, dibutyltin dilaurate, etc.; hearing, 38628
Sulfathalidine boluses; approval withdrawn, 40547
Sulfonamide, 8184, 41281
Tetracycline (chlortetracycline and oxtetracycline) containing premixes; proposed withdrawal, hearing; correction, 2449
Tylosin premix; approval withdrawn, 52775
Utonex ethinyl-estradiol and nitrofurathiazide suspension and suppositories; approval withdrawn, 32868
Vet Spray Skin Antiseptic and Cleanser; approval withdrawn, 61007
Whitmoyer Pink Eye Powder; approval withdrawn, 46377, 59907
Bakery products; identity standards, hearing, 22785, 30354
Biological product licenses:
Colonial Blood Components, Inc.; revocation, 59905
Garden State Blood Bank, Inc.; revocation, 44887
Merck Sharp & Dohme, 1131
North Carolina Serums, Inc., 15195
Pioneer Blood Service, Inc.; revocation, 44888
Biological products:
Bacterial vaccines and antigens; license revocations and reclassification, 50247
Factor IX complex (Human) potency test; method availability, 9863
Mumps virus vaccine, live for hyperimmunization of source plasma (human donors); approval withdrawn, 21052
Plasma, source (human); availability of guideline, 19461
Skin test antigens; license revocations, reclassifications, etc., 50250, 60235
Bioresearch studies, toxicological testing laboratories and pesticide toxicity test reports; memorandum of agreement with EPA, 14124
Brazil nuts, etc.; aflatoxin; guidelines availability, 2444
Chemical, physical, and biological analysis; memorandum of agreement with Association of Official Analytical Chemists, 25484
Chlorofluorocarbons; nonpropellant uses; meeting, 1986
Chocolate and chocolate liquor, defect action level; guidelines availability, 2445
Color additives:
Citrus Red No. 2, FD&C Blue No. 1, Orange B, FD&C Yellow No. 5, FD&C Red No. 3, FD&C Red No. 40; petition denied, 54990
FD&C Red No. 40; working group, interim report availability, 18258
Color additives, petitions filed or withdrawn:
American Cyanamid Co., 1545
Combe Inc., 14737
Kirker Chemical Co., 11268
Scott, Glenn M.W., 1998
Committees; establishment, renewals, terminations, etc.:
Advisory committees; request for nomination, 49572
Antimicrobial Agents Review Panel, 29360
Antiperspirant Drug Products Review Panel, 1133
Arthritis Advisory Committee, 18769, 22075
Blood and Blood Derivatives Review Panel, 2942, 15778
Cardiovascular and Renal Drugs Advisory Committee, 45645
Contraceptive and Other Vaginal Drug Products Review Panel, 1133, 53827
Dermatology Advisory Committee, 1132
Device Good Manufacturing Practice Advisory Committee, 9861, 58632
Drugs Bureau advisory committees, 2002
Endocrinologic and Metabolic Drugs Advisory Committee, 45645
External Drug Products, Miscellaneous, Review Panel, 15778
Gastrointestinal Drugs Advisory Committee, 16414
GRAS Substances Select Committee, nominations, 50740
Medical Device Classification Panels, 28553, 28554, 44887
Medical Device Classification Panels; correction, 57658
Miscellaneous External Drug Products Review Panel, 2941
Miscellaneous Internal Drug Products Review Panel, 1133
Obstetrics and Gynecology Advisory Committee, 16414
Oncologic Drugs Advisory Committee, 44887
Oral Cavity Drug Products Review Panel, 2941, 15778
Pulmonary-Allergy Drugs Advisory Committee, 11266
Radiopharmaceutical Drugs Advisory Committee, 15196
Science Advisory Board, 10624, 29834
Surgical Drugs Advisory Committee, 1133
Technical Electronic Product Radiation Safety Standards Committee et al., 10623, 12950, 58119
Vitamin, Mineral, and Hematinic Drug Products Review Panel, 3766
Cranberry sauce, mold adulteration; availability of guideline, 12941
Dibromochloro-propane (DBCP); action levels for residue in agricultural commodities, 24139
Drug manufacturers, repackagers, and distributors; memorandum of understanding with Virginia Board of Pharmacy, 19460
Drug registration; draft forms; availability, 5069
Drug suppliers; memorandum of understanding with State of New York Office of General Services, 30353
Environmental statements; availability, etc.:
Subtherapeutic antibacterial agents in animal feeds, 35108
Food additives, petitions filed or withdrawn:
Abbott Laboratories, 40547
American Cyanamid Co., 1131, 45644, 60234
Ashland Oil, Inc., 1545
Betz Laboratories; correction, 1997
Cottonseed products, modified; response to objections, 43556
DeLaval Separator Co., 2445
DeSoto, Inc., 5891
Distributors Processing, Inc., 10621
Dow Chemical, 8183, 14737, 26131
DRG Flexible Packaging, Ltd., 14737
E. I. Dupont de Nemours & Co., 8183, 14738
Emser Industries, Inc., 27236
Hercules, Inc., 8183
ICI Americas, Inc., 5071
Institute for Research, Inc., 13632, 15195
Marshall Minerals, Inc., 21727
Morton Chemical Co., 36143
Nalco Chemical Co., 8184
Rohm & Haas Co., 1132
Solvay American Corp., 25192
Witco Chemical Corp., 8852
Food and beverages, model vending ordinance; revision, 46377
Food Chemicals Codex; monographs changes; inquiry, 16413, 20557

Food labeling:
Ingredient labeling, nutrition labeling, and imitation foods; hearings, 25296
Saccharin and its salts; guidelines and hearing; corrections, 2450, 2942
Food processing, storage, and service facilities; memorandum of understanding:
Allegheny County Health Department, 2448
Food Service Sanitation Manual; availability, 36696
Food store, retail; model sanitation ordinance; availability, 2941, 4117, 51450
Glassware, lead and cadmium decorated; meeting, 4116
Grapefruit, canned; identity and quality standards; temporary permits for market testing, 22783
GRAS or prior-sanctioned ingredients; hearings, 7036, 9864, 17055, 25192, 25487, 26132, 41276, 41277
GRAS or prior-sanctioned ingredients; information availability, 12947, 54293
GRAS review; flavoring substances; additions, and effective date extension, 1995, 22784, 30349
GRAS review; food ingredients; submission of unpublished safety data, 12941, 17054
GRAS review; manganese salts; hearing, 50249
GRAS status, petitions:
Cellulose fines, 21727
Chlorine dioxide in water for freshly slaughtered red meat, 51845
Choline stearate; withdrawal, 46376
Glycine hydrochloride, L-cysteine hydrochloride, L-arabinose, and B-alanine; withdrawn, 7270
Ground whole aspen and parts, 32864
Karaya gum (sterculia gum) in baked goods and baking mixes, 59907
Lactase enzyme, 11266
Molybdenum disulfide; withdrawal, 31435
Pea protein concentrate, pea fiber and pea starch, 14738
Sodium sulfate in sanitizing formulations; withdrawal, 3315
Zeolite, greensand and manganese greensand; withdrawal, 33822
Health care services, meetings, 2002, 7713, 9863, 34543
Hepatitis B Virus Vaccine Workshop; meeting, 59906
Human drugs:
Antacid products, over-the-counter; classification and labeling, 39427
Anticholinergic drugs (containing hexocyclium methylsulfate) in controlled-release dosage form; approval withdrawn, 1132, 5072, 49568
Anticoagulant drugs, certain; efficacy study hearing; correction, 3315
Antipsychotic drugs; labeling; precaution statement, 21051, 36696, 42042
Antispasmodic drugs; hearing opportunity rescinded, 26489, 29829
Antispasmodic drugs; permission for drugs to remain on market, 26490, 29830
Bronchodilators, inhalation; approval withdrawn, 8852, 30348, 43070
Chlormezanone, meprobamate, chlordiazepoxide; efficacy study implementation, 1545
Chlorpropamide, 56277
Coronary vasodilators, single-entity; efficacy study implementation, 41282
Cyproheptadine hydrochloride; efficacy study implementation, hearing, 32187, 39176
Delcozine drops; approval withdrawn, 1546
Depo-Provera; hearing, 28555, 35108
Duotrate 30 and 45 with phenobarbital capsules; approval withdrawn, 15778, 11125
Elorantyrone; approval withdrawn, 29833
Estrogen-androgen combination drugs (fluoxymesterone, ethiny estradiol, DES, etc.) and estrogen-containing drugs for oral or parenteral use; efficacy study implementation; correction, 1132
Estrogens; hearing on proposal to withdraw approval, 49564, 60234
Ethoheptazine citrate; efficacy study, hearing, 10627
Florantyrone; approval withdrawn, 14741
Guanethidine sulfate; efficacy study implementation, 49567
Hunter Sessions vena cava balloon occluder; premarket approval, 22075
Immune serum globulin; availability of guidelines, 15779
Investigation procedures and standards; availability of clinical guidelines, 7712
Isocarboxazid; hearing on proposed approval withdrawn, 30350
Isocarboxazid tablets, etc.; efficacy study implementation, 30351
Isoetharine mesylate or isoetharine hydrochloride, single-entity; efficacy study implementation, 30349, 36696
Isoniazid; efficacy study, 3763
Lidocaine ointment 5 percent; efficacy study implementation, 49570
Limulus amebocyte lysate as alternative for rabbit pyrogen test; licensing; extension of effective date, 1996
Methylphenidate hydrochloride; efficacy study implementation, hearing, 18256
New drug applications; interim list; availability, 28557
New drug applications; periodic reporting exemption revocation, 20556
Onycho-phytex solution; efficacy study hearing, 24140
Oral contraceptives; physician and patient labeling, 4223, 9863, 10622, 11760
Over-the-counter drug products, guidelines; availability, 55466
Over-the-counter drugs; antacid products, classification and labeling:, 55464
Oxidized cellulose preparations, 7044
Oxytocic drugs, injectable; hearing, 15779
Parenteral protein hydrolysate solutions; hearing on proposed approval withdrawn, 32869
Phenformin hydrochloride; approval withdrawn, 54995
Phytex liquid; approval withdrawn, 24141
Potassium iodine as thyroid-blocking agent in radiation emergency, 58790
Povidone and gelatin injections; approval withdrawn, 2942, 14743, 26131
Prescription drug products; conditions for marketing pending completion of scientific studies, 7044
Prochlorperazine; efficacy study implementation, 14742
Prochlorperazine maleate, etc.; proposed withdrawal; hearing, 41278
Propantheline bromide with thiopropazate hydrochloride; approval withdrawn; hearing, 8185
Propoxyphene-containing preparations; efficacy study implementation, 26131
Propoxyphene-containing preparations, labeling, 14739
Proteolytic enzymes, oral; withdrawal, 18770, 22075
Radiopaque drugs, 7038
Radiopharmaceutical drug; hearing withdrawal, 14739
Rheumatoid arthritis, slow acting drugs; availability of guidelines, 46375
Sparteine sulfate intramuscular injection and oxytocin citrate buccal tablets; hearing on proposal to withdraw approval, 58634
Steroid combination, oral; approval withdrawn, 8187, 54298
Sulfonamides; oral use; approval withdrawn, 43070
Sulfonamides; oral use; hearing, 18771
Sulfonamides; oral use; revocation of exemption, 18771
Theophylline, ephedrine and hydroxyzine; approval withdrawal, hearing, 12380
Thyroglobulin tablets; efficacy study, hearing; correction, 3316
Tolbutamide; efficacy study implementation, 55465
Topical ointment mycitracin and ointment baciguent; certification exemption, 41285
X-Otag plus tablets; prehearing conference, 4682, 11760
Improving Government regulations, 23142, 50740
Interagency Regulatory Liaison Group:
Testing standards and guidelines; inquiry, 1523, 1987
Work plans and meetings, 7174
Labeling:
Stimulant drugs for children; uniform physician labeling, 49573
Laboratory studies, nonclinical; good laboratory practices; inflation impact statement, 5071
Lasers; approvals and extensions of variance:
Coherent Radiation; correction, 3771, 5068
Laser Images, Inc., 38626
Livestock and poultry producers, technical information education programs; memorandum of understanding with Science and Education Administration, 26492
Medical devices:
ABUSCREEN; reclassification petition recommendation, 5070
Amikacin RIA kit, 125-I; reclassification petition recommendation, 5068
AMISAK, amikacin serum assay kit, panel recommendation, 1995
Amsof soft contact lens; premarket approval, 50249
Angiotensin converting enzyme assay system; reclassification petition recommendation, 13631
Cholylglycine RIA (PEG) diagnostic kit; reclassification petition recommendation, 24600
Conjugated sulfolithocholic acid RIA diagnostic kit; panel recommendation on petition for reclassification, 28557

Dental; transfer of administrative responsibility, 18769
Distributors of imported devices; meeting, 25192
EMIT, theophylline assay; panel recommendation, 1996
Enzymatic protein in blood, test kit for detection of; reclassification petition recommendation, 5071
Enzymatic radiochemical assay for gentamicin; petition for reclassification, 4116
Enzyme immunoassay for methaqualone kit; reclassification petition recommendation, 7711
FIAX anti-DNA antibody test; recommendation on petition for reclassification, 4680
Galactose-1-Phosphate Uridyl Transferase (Gal-PUT) Procedure No. 195; reclassification petition recommendation, 24605
Gastroenterological and urological devices; recommendation on petition for reclassification, 4680
Glycosylated (fast fraction) hemoglobin quick column methodology; reclassification petition, 32189, 43555
Gonorrhea antibody screening kit; denial, 36696
Good manufacturing practices; economic impact assessment, availability, 29359
Hearing aids; applications for exemption from State and local requirements; hearing, 32868
Hip prosthesis, ceramic; reclassification petition recommendation, 24601, 26493, 30348, 35749
Hip prosthesis polyethylene acetabular cup, metal stem and ceramic self-locking ball; inquiry, 7709
Intraocular lenses; investigational device exemptions; extension of time, 11759
Lindocaine assay kit; recommendation on petition for reclassification, 4682
O.H.C. Ventilator to class II; petition for reclassification, 12379
Serum alcohol control; petition for reclassification, 43554
Softcon Hydrophilic contact lens; premarket approval, 50251
"Tri-Cy Test Set"; petition for reclassification, 44889, 57658
Meetings:
Advisory committees, panels, etc., 38, 1998, 2003, 2447, 3762, 3763, 5890, 7027, 7029, 7710, 7711, 9352, 9353, 10624, 11265, 11267, 11758, 13631, 15194, 15196, 15777, 16414, 17049, 17053, 17540, 17541, 17542, 19923, 20555, 20556, 21052, 21056, 22076, 22783, 22784, 26484, 26488, 30892, 32865, 36692, 39426, 41273, 43067, 43068, 43069, 47285, 47790, 49051, 51846, 53822, 58629, 59136
Chlorofluorocarbons; nonpropellant uses, 1986
Combination drugs, 46375
Consumer participation, 26493
Consumer Representative Ad Hoc Committee, 21727
Glassware, lead and cadmium decorated, 4116
Health care services, 2002, 7713, 9863, 34543
Hepatitis B Virus Vaccine Workshop, 59906
Medical devices, imported; distributors, 25192
New York District Consumer Ad Hoc, 34543
Patient package inserts conference, 52774
Saccharin and Food Safety Policy Study Committee, 21726, 33822
X-ray Examinations Referral Criteria National Conference, 46376
Mercury contamination of fish, shellfish, etc.; sample preparation instructions, 24139
Milk products, dry; memorandum of understanding:
Swedish Government Control Board, 2446
Nuclear medicine; thyroid gland diseases evaluation; inquiry; correction, 1656, 2003
Olives, pitted; level of defects; guideline availability, 24603
Operation Common Sense Recodification Plan (1978-1982); availability, 50740
Orange juice, frozen concentrated; temporary permit for market testing; extension, 36695
Organization and authority delegations:
Gonorrhea diagnostic devices; transfer from Bureau of Drugs to Bureau of Medical Devices, 28558
Vascular grafts; transfer from Bureaus of Biologics and Drugs to Bureau of Medical Devices, 20556
Package inserts, patients, conference, 52774
Peaches, canned; identity standards; temporary permit for market testing; extension, 46584
Pears, canned; identity standards; temporary permit for market testing, 39176
Pesticide residue of mirex in fish; guideline availability, 14736
Pesticides; action levels for residue in agricultural commodities:
Dibromochloro-propane (DBCP), 24139
Pineapple and pineapple juice, canned; level of defects; guideline availability, 43554
Pineapple juice, canned; quality standards, 47284, 60234
Pneumococcal vaccine, polyvalent; guidelines for laboratory test procedures and lot release requirements, 4115
Poisonous and deleterious substances; availability of action levels, 19922
Radioactive Materials, Naturally Occurring and Accelerator-Produced (NARM), guides; availability, 14123
Radiological health:
Microwave oven labeling requirements; exemption petition guidelines, 59906
Tomato juice; identity standard; temporary permits for market testing, 43558
Tomato juice, tomato concentrates; identity standards; temporary permits for market testing, 30348
Tomato juice concentrate; identity standard; temporary permit for market testing, 2449, 12949
Tomato product rot, guidelines; availability, 58119
Toxic and hazardous substances:
Lead and cadmium in decorated glass tumblers; interagency task force report, availability, 58633
Water for drinking or culinary purposes on interstate carrier conveyances; memorandum of understanding with EPA, 43072
Water quality analysis; memorandum of agreement with EPA, 44888, 57658
X-ray examinations referral criteria, National conference, 46376
X-ray systems; approvals and extensions of variance:
EMI Therapy Systems, Inc.; diagnostic systems, 9862, 13632
Frank Scholz X-ray Corp., 53826
Siemens Corp.; intraoral source dental system, 24604
X-ray systems, diagnostic, petition denied, 15776, 18258

## FOOD AND NUTRITION SERVICE

### RULES

Child nutrition programs:
Cash in lieu of commodities; annual food value estimate, 12300
Child care food program; FY 1978 apportionment, 25130
Child care food programs; audit funds, 37979
Commodity supplemental food program, 8777
Food service equipment assistance program; FY 1978 apportionment, 25135, 29263
Meals and free milk in schools; racial or ethnic identification, 37980, 38569, 39070
Milk program, special; eligibility limitations, 1059
Nonfood assistance program; management evaluations and audits, 59826
Nonfood assistance programs; funds, initial apportionment for 1978 FY, 5794, 7609
Nutrition education and training, 12297, 25133
Nutrition education and training; FY 1978 apportionment, 25131
State administrative expense funds, 37172
Food distribution; donation for U.S. and territories, etc.:
CFR section removed, 9783
Elderly, nutrition programs; cash payments in lieu of donated foods; correction, 4029
Nonprofit summer camps for children, 20955
School lunch program, National; donated-food preferences, 39073, 41947
Food stamp program:
Administrative and judicial review; food retailers and wholesalers, 43279
Demonstration, research, and evaluation projects, 39074
Demonstration, research, and evaluation projects; applicability of government circulars, 54215
Demonstration, research, and evaluation projects; California SSI conversion project, 39077
Eligible household certification, coupon issuance, 54199
Food Stamp Act of 1977; allotments, eligibility criteria, certification and issuance procedures, etc., 47882
Retail food stores and wholesalers; participation, disqualification criteria, etc., 43273

Retail food stores wholesalers; participation; redemption certificate elimination, 9783
State agencies, administrative costs; monitoring and reporting program performance, 35645
State agencies and eligible households participation; hearings for households disqualified for fraud, 22669
State agencies and eligible households participation; method of counting utility costs for excess shelter deduction, 1924, 8111
State agencies and eligible households participation, retroactive relief, 41949
Workfare demonstration project, 55340
Food stamp program; State agencies and eligible household participation; list:
Alaska, 21305, 57543
48 States and District of Columbia, 21304, 22670
Guam, 21311, 22670, 57564
Hawaii, 21307, 57492
Puerto Rico, 21308, 22670, 57510
Virgin Islands, 21309, 22670, 57526
Wisconsin, 29264
Milk program, special:
Management evaluations and audits, 59825
School breakfast program:
Management evaluations and audits, 59825
School lunch program:
Management evaluations and audits, 59824
Nutritional requirements, 37168
Reimbursement for less than complete Type A lunches in junior high and middle schools, 25991
School food authorities and foods service management companies, etc.; contractural arrangements, etc., 60860
Summer food service program for children:
Account system for food service payment checks, 32738
Sponsor approval procedures, requirements for participation, etc., 13022
State agency and sponsor provisions and definitions, 4040
Women, infants and children; supplemental food program, 29264
Calorie infant formula, authorized requirement, 58542
Calorie infant formula, low; addition to WIC food package, etc., 23985

**PROPOSED RULES**

Child nutrition; nonfood assistance program:
Food service equipment assistance program, and on-site preparation of hot meals, 50185
Food distribution; donation for U.S. and territories, etc:
School lunch program, National; schools' donated-food preferences, 26447
Food stamp program:
Administrative and judicial review; work registration voluntary quit provision, 54253
Food Stamp Act of 1977; allotments, eligibility criteria, certification and issuance procedures, etc., 18874
Indian reservations, administration, food distribution, and definition, 57798
Workfare Demonstration project, 29950, 30290
Working draft; availability, 10568
School lunch program:
Competitive food services; restrictions, 17476, 25137, 27554, 27843, 58780
Reimbursement for less than complete Type A lunches in junior high and middle schools, 7650
School fund authorities and food service management companies, etc.; contractual arrangements, etc., 1955
Summer food service program for children, 50820, 51806
Sponsor approval procedures, requirements for participation, etc., 4622

**NOTICES**

Child care food program:
Donated foods, value of (July, 1977--June, 1978), 1110
Donated foods, value of (July, 1978--June, 1979), 31419
Payment factors, National average (January--June 1978), 2415
Payment factors, National average (July--December 1978), 31407
Child nutrition programs:
Cash in lieu of commodities study solicitation for pilot projects, 15171
Education, demonstration and development projects, 29022
Income poverty guidelines; eligibility for free and reduced-price meals and milk, 28526
Elderly nutrition programs:
Donated foods; level of assistance, 60177
Food stamp program:
Collateral contact for certification pending verification; implementation of Aiken v. USDA court order, 4661, 6286
Food stamp certification handbook; migrant farmworkers, collateral contract, etc.; procedures publication, 31407
Workfare compensation classified as earned income, 26462
Improving Government regulations; inquiry, 21992
Meetings:
Maternal, Infant and Fetal Nutrition Advisory Council, 2415, 21708
Milk program, special:
Reimbursement rate (July, 1977--June, 1978), 1110
Reimbursement rate (July, 1978--June, 1979), 31419
School breakfast program:
Commodity entitlements for school year 1979; policy for States, 60972
Donated foods, value of (July, 1977--June, 1978), 1110
Payment factors, National average (January--June 1978), 2416
Payment factors, National average (July--December, 1978), 31419
School lunch program:
Cash in lieu of commodities; donated commodities; value for 1978 school year, 27219
Commodity entitlements for school year 1979; policy for States, 60972
Donated foods, value of (July, 1977--June, 1978), 1110
Donated foods, value of (July, 1978--June, 1979), 31419
Payment factors, National average (January--June 1978), 2416
Payment factors, National average (July--December, 1978), 31419
Women, infants and children; special supplemental food program:
Funding distribution formulas; inquiry, 46881, 47759, 58106

## FOOD SAFETY AND QUALITY SERVICE

**RULES**

Animal fats for export certification:
Practice rules; withdrawal of services, etc., 11147
Butter, process or renovated; CFR Subchapter redesignation, 3
Dogs, cats, etc., certified products for:
Inspection service, rate increase, 39340
Practice rules; withdrawal of services, etc., 11148
Eggs and egg products, grading and inspection:
Fees and charges, 56213
Technical amendments, 60137
Fruits and vegetables (processed); inspection and certification, 46291
Peaches, clingstone (canned); grade standards, 20958, 25417
Raisins, 51754
Statistical sampling acceptance procedures, uniform, 10539
Meat and poultry inspection, mandatory:
Beef roast; minimum cooking requirements, 30793
Holiday service and overtime, facilities for inspection and billing establishments; Veteran's Day observance, 51754
Israel added to list of eligible countries, 8117
Lard and leaf lard; composition standard, 25420
Mechanically processed product standards and labeling requirements, 26423
Nitrates, nitrites, and ascorbates (or isoascorbates) in bacon, 20995, 32137, 32741, 33678
Slaughtering practices, 12847
Transportation; livestock lungs and lung lobes, 43445
"U.S. Retained" tags, and marking outside containers of condemned livers, 29268
Meat and poultry inspection, mandatory; special provisions for designated States:
New Hampshire, 29269
Meat and poultry inspection, voluntary:
Overtime rates for establishments, importers, or exporters reflecting Federal pay raise, 51385
Practice rules; withdrawal of services, etc., 11148
Plants and dairy products; grading and inspection requirements; technical amendments, 60138
Potatoes (Irish); livestock feed diversion program, 54921, 59828
Poultry and rabbit products; grading and inspection requirements; technical amendments, 60138
Records, registration, and reports; beef roast, minimum cooking requirements, 30793
Regulatory analysis statement, 30793
Tomato juice, canned; grade standards, 19815
Tomato puree, canned; grade standards, 15611

**PROPOSED RULES**

Broccoli, frozen; grade standards, 35722
Cheeses, mozzarella; grade standards, 11204

Fruit preserves or jams; grade standards, 57608
Fruits and vegetables (processed), inspection and certification:
Apricots (canned) and sweet cherries (canned); grade standards; advance notice, 34490
Grapes and pears, canned; grade standards; advance notice, 43027
Green beans and wax beans, frozen; grade standards, 47755, 56244
Peaches, canned freestone; grade standards, 38015
Gladiolus corms (bulbs); study draft grade standards; advance notice, 19857
Ice cream, grade standards; inquiry, 7232
Jelly, fruit; grade standards, 31343
Juice, grapefruit; grade standards, 28511, 56245
Meat and poultry inspection, mandatory:
Beef roast; minimum cooking requirements, 18681, 21682
Cattle and sheep carcasses, parts, and meat; grade marking, 3145, 3724
Export certification inspection charges; clarification, 50188
Labeling requirements, uniform; net weight, 1099, 2881, 4050, 8807, 50188
Milk albuminate in sausage products; withdrawn, 39394
Nitrates and nitrites in cured meat products, 18193
Nitrites and potassium sorbate in bacon; decrease in levels allowed, 21007
Poultry chillers; required levels of water adjustment, 14043, 15158
Sausages, small; labeling, 43027
Sodium ascorbate or sodium erythorbate (isoascorbate) in bacon; levels allowed, 39119
TBHQ (tertiary butylhydroquinone); antioxidant use, 19858
Tissue from ground bone; labeling and identity standards; reopening, extension of time, and hearing, 3284
Turkey ham; standard, 24064
Meats, prepared meats, and meat products:
Grading, certification, and standards, 3140, 3719, 6957, 9284, 10571
Regulatory analysis statement, 18682

NOTICES

Humanely slaughtered livestock, identification of carcasses; list of establishments, 10597
Improving Government regulations; inquiry, 21992, 26091
Livestock, humanely slaughtered, identification of carcasses; list of establishments, 43479
Meat and poultry plants, chronic problem; publicizing names; policy statement, 11244, 19897
Nitrates and nitrites in cured meat products; policy statement; inquiry; extension of time, 15172, 16357
Packers and poultry plants; slaughtering and processing data release, 58595

## FOREIGN AID

*See Agency for International Development. State Department.*

## FOREIGN ASSETS CONTROL OFFICE

RULES

Cuban assets control:
Cuban nationals; transactions incident to U.S. travel, 19852
Remittances to close relatives, 1336, 51763
Trade territory, authorized; definition, 51762
Foreign assets control:
Vietnam and Cambodia; remittances to close relatives, 1335, 51763

PROPOSED RULES

Cuban assets control:
Blocked funds, retention in interest-bearing accounts, 53021
Foreign assets control:
Blocked funds, retention in interest-bearing accounts, 53016
Foreign funds control:
Blocked funds, retention in interest-bearing accounts, 53023

NOTICES

Rhodesian sanctions; imports of ferrochromium and chromium-bearing steel products from listed countries:
India, 26353
Philippines, 18619
Turkey, 7282

## FOREIGN CLAIMS SETTLEMENT COMMISSION

NOTICES

Meetings; Sunshine Act, 3670, 8345, 12987, 17113, 23086, 28328, 32532, 38992, 45688, 49886, 58255

## FOREIGN LANGUAGE AND INTERNATIONAL STUDIES, PRESIDENT'S COMMISSION

NOTICES

Hearings, 55824

## FOREIGN-TRADE ZONES BOARD

NOTICES

Foreign-trade zone applications:
Battle Creek, Mich., 22066, 50233
Boonville, Mo., 44876
Boston, Mass., 58214
Broward County, Fla., 36989
Chicago, Ill., 23627, 60322
Cleveland, Ohio, 10953, 46886
Dallas/Ft. Worth, Tex., 10717, 37478
Galveston, Tex., 20525
Greater Cincinnati, Ohio, 44875, 55811
Harrisburg, Pa., 10422
Little Rock, Ark., 58214
Milwaukee, Wis., 13412, 46887
Mt. Olive and Woodbridge, N.J., 50234
New Jersey, 24566
New Windsor, N.Y., 20526
New York, N.Y., 34179, 45424
Orlando, Fla., 19721, 46887
Philadelphia, Pa., 14531
Pima County, Ariz., 52274
Portland, Oreg., 35975, 60323
Spartanburg County, S.C., 20526
Suffolk County, N.Y., 24723, 54284
Wilkes-Barre, Pa., 10423

## FOREST SERVICE

RULES

Administration:
Forest Appeals Board; appeal procedures; CFR Part deleted, 31005
Grants to States for establishing Young Adult Conservation Corps (YACC), 11827
Landownership; land exchanges, 24831
Landownership; National Forest townsites, 5821
Livestock, unauthorized; impoundment and disposal, 36245
Off-road vehicle use, 20008
Organization and functions:
National forest system; land management units, etc., 27190
Prohibitions:
Chattooga Wild and Scenic River; permits for, 3706
Manistee National Forest, 28476, 42749
National Wild and Scenic Rivers System, 32136
Property management; protection of insignia, 23574
Range management:
Grazing and livestock use on National Forest System, 27532
Timber, sale and disposal:
Bidding methods, 21882
Contract conditions; payment guarantees, letters of credit, 38008
Transportation system; road management, etc., 20007
Youth Conservation Corps programs; grants to States for establishment, 40999

PROPOSED RULES

Grazing:
Livestock on National Forest System lands; fees, 58387
Planning; National Forest System land and resource management, 39046, 46984, 54958, 58593
Prohibitions:
National Wild and Scenic Rivers System, 23610
Timber, sale and disposal:
Advertising periods and dollar limits, 46323
Bidding methods; oral auction bidding for National forest timber, 13401
Contract conditions; payment guarantees, letters of credit, 20022
Pre-award compliance requirements, 1628, 26757

NOTICES

Authority delegations:
Land Director and Deputy, 1633, 3733
Regional Foresters and Deputies, 1633
Classification, development plans, and boundary descriptions:
Flathead Wild and Scenic River Area, Mont., 26092
Lake Tahoe Basin Management Unit, Calif. and Nev., 1971
Middle Fork of the Feather Wild and Scenic River Area, Calif., 57169
Rogue National Wild and Scenic River, 48671
Environmental statements; availability, etc.:
Alaska National Forests, Cannery Creek aquaculture facilities and timber sale, 13907

Angeles National Forest, San Gabriel Planning Unit Land Management Plan, Mont., 7454
Angeles National Forest, Sheep Mountain Wilderness Study Area, Calif., 17020, 17378
Angeles National Forest, Timber Management Plan, Calif., 17992
Arapaho National Forest, Williams Fork Land Management Plan, Colo., 14090
Beaverhead National Forest, land exchange proposal, Mont., 32842
Beaverhead National Forest, Land Management Plan, Mont., 7454
Boise National Forest, Landmark Planning Unit Land Management Plan, Idaho, 58397
Boise National Forest, Western Spruce Budworm, Idaho, 15464
Bridger-Teton National Forest, Greys-Salt River Planning Unit, Wyo.; extension of time, 50007
Bridger-Teton National Forest, Union Pass Planning Unit, Wyo., 3294
Caribou National Forest, Bear River Land Management Plan, Idaho, 17989
Chequamegon National Forest, Timber Management Plan, Wis., 22227
Chugach National Forest, Chugach Moose-Fire Management Program, Alaska, 12897
Clearwater National Forest, Elk Summit Planning Unit, Idaho, 17018
Cleveland National Forest, Timber Management Plan, Calif., 17992
Cleveland National Forest, Trabuco Planning Unit, Calif., 1111
Coconino National Forest, Arizona Snow Bowl Ski Area Proposal, Ariz., 28219
Colville National Forest, Kettle Range Planning Unit Land Management Plan, Wash., 13596
Colville National Forest, precommercial thinning, Wash., 57169
Colville National Forest, Wash.; noxious weed control, 57313
Cooperative Spruce Budworm Supression Project, Maine, Vt., and N.H., 17991
Coronado National Forest, Comprehensive Land Management Plan, N. Mex., 32156
Daniel Boone National Forest, Beaver Creek Wilderness, Ky., 2743
Daniel Boone National Forest, Timber Management Plan, Ky., 40046
Deerlodge National Forest, Land Management Plan, Mont., 7454
Deerlodge National Forest, Upper Rock Creek Planning Unit, Mont., 15464
Eldorado National Forest, Resource and Timber Management Plan, Calif., 3733
Flathead National Forest, Timber Management Plan, Mont., 29820
Fremont National Forest, Ten-Year Timber Resource Management Plan, Oreg., 6292
Gallatin National Forest, land exchange proposal, Mont., 32842
Gifford Pinchot National Forest, Bear Planning Unit Management Plan, Wash., 17989
Gifford Pinchot National Forest, Lone Tree Planning Unit, Wash., 8573, 21916
Gifford Pinchot National Forest, Naches-Tieton-White River Planning Unit Management Plan, Wash., 1812
Gifford Pinchot National Forest, Upper Cispus Planning Unit Land Management Plan, Wash., 21708
Gila National Forest, geothermal leasing, N. Mex., 26462
Guadalupe Escarpment Wilderness Area, proposal; hearing, 50719
Gunnison National Forest, Colo., 8163, 56679
Gypsy moth suppression and regulatory program, Pa., N.Y., N.J., Vt., 1633, 18724, 51110
Helena National Forest, Magpie-Confederate Land Management Plan, Mont., 17991
Idaho Panhandle National Forests, Hayden-Wolf Lodge Planning Unit, Land Management Plan, Idaho, 31188
Jefferson National Forest, Mount Rogers National Recreation Area Planning Unit, Va., et al., 3411, 13083
Kaibab National Forest, Grand Canyon National Parks; Ariz., 60975
Kisatchie National Forest, Kisatchie Unit Plan, La., 25839
Klamath National Forest, King Planning Unit, Land Management Plan, Calif., 18725
Klamath National Forest, Medicine Lake Planning Unit, Calif., 14326
Kootenai National Forest, Hoodoo-Fisher Planning Unit, Mont., 56078
Kootenai National Forest, Keeler Planning Unit, Mont., 5555
Kootenai National Forest, Lick Mountain-Rock Candy Planning Unit, Mont., 5020
Kootenai National Forest, Star Planning Unit; Mont. and Idaho, 10948
Kootenai National Forest; Wolf Planning Unit Land Management Plan, Mont., 58396
Lewis and Clark National Forest, Rocky Mountain Front Planning Unit, Mont.; extension of time, 14530
Lincoln National Forest, Guadalupe Escarpment Wilderness, N. Mex., 50007
Lolo National Forest, Forest Plan, Mont., 35519
Los Padres National Forest, Timber Management Plan, Calif., 17992
Malheur National Forest, South Fork Planning Unit Land Management Plan, Oreg., 13596
Mendocino National Forest, Timber Management Plan, Calif., 6292, 15757
Modoc National Forest, Medicine Lake Planning Unit, Calif., 14326
Monongahela National Forest, Spruce Knob Lakes Recreation Complex, W. Va., 986
Mount Rogers National Recreation Area and Scenic Highway, Va.; correction, 29594
Mt. Baker-Snoqualmie National Forest,Naches-Tieton-White River Planning Unit Management Plan, Wash., 1812
Mt. Hood National Forest, Badger-Jordan Land Management Plan, Oreg., 5859
Mt. Hood National Forest, Breitenbush Area, Oreg., 2645
Mt. Hood National Forest, Mt. Hood Meadows Ski Area, Oreg., 14090
Nebraska National Forest, Prairie Dog Management Plan, Nebr., 20028
Nez Perce (Nee-Mee-Poo) National Historic Trail Study, 46055
Nezperce National Forest, Gospel-Hump Wilderness Study Area and Land Management Plan, Idaho, 2416
Nezperce National Forest, Hot Point Land Management Plan, Idaho, 6824
North Idaho Forests, silvicultural treatments with herbicides, 1111
Ocala National Forest, Timber Management Plan, Fla., 54112
Ochoco National Forest, Ochoco-Crooked River Planning Unit, Oreg., 20258
Ochoco National Forest, South Fork Planning Unit Land Management Plan, Oreg., 13596
Okanogan National Forest, Tonasket Planning Unit, Wash., 12898, 15345
Olympic National Forest, Canal Front Land Management Plan, Wash., 20258
Ozark National Forest, Mount Magazine Recreation Area, Ark., 59534
Pacific Northwest Region National Forests; vegetation management with herbicides, 10597, 37734
Pacific Northwest Region National Forests; Western Spruce Budworm Program, 22762
Payette National Forest, Gospel-Hump Wilderness Study Area and Land Management Plan, Idaho, 2416
Payette National Forest, Warren Land Management Plan, Idaho, 26761
Payette National Forest, Western Spruce Budworm, Idaho, 15464
Rio Grande National Forest, Conejos Wild and Scenic River study, Colo., 55269
Salmon National Forest, Leesburg Land Management Plan, Idaho, 17991
Sam Houston National Forest, Unit Plan, Tex., 12052, 19252
San Bernardino National Forest, Sheep Mountain Wilderness Study Area, Calif., 17020, 17378
San Bernardino National Forest, Timber Management Plan, Calif., 17992
Santa Fe National Forest, Land Management Plan, N. Mex., 34513
Shasta-Trinty National Forest, Medicine Lake Planning Unit, Calif., 14326
Shoshone National Forest, Dunior Special Management Unit, Land Management Plan, Colo., 8574
Six Rivers National Forest, Gasquet-Orleans Road, Calif.; extension of time, 5859
Spruce Budworm Suppression Project, 1979 statement; Maine, 47764
St. Joe Wild and Scenic River, 14326
Superior National Forest, Lake-Forest Enterprises, Inc., Minn., 3922
Tahoe National Forest, North Fork American Wild and Scenic River; Calif., 11728
Ten Year Timber Resource Management Plan Shelton Cooperative Sustained Yield Unit, 11838
Tongass National Forest, Ketchikan area timber sale, Alaska, 55430
Tonto National Forest, Lower Salt River Recreation Plan, Ariz., 37734

Wallowa-Whitman National Forest, Grande Ronde Planning Unit, Oreg., 16529
Wasatch National Forest, Salt Lake Planning Unit, Utah, 1812
Wenatchee National Forest, Naches-Tieton-White River Planning Unit Management Plan, Wash., 1812
West Fork Sipsey River, Wild and Scenic River Proposal, Ala., 51110
Western Spruce Budworm Control, Wash., 6641
White River National Forest, Eagle-Aspen Unit Land Management Plan, Colo., 8163
Willamette National Forest, Breitenbush Area, Oreg., 2645
Grazing fee system, Eastern Region review, 31959
Grazing fees review, National Grasslands, 53481
Improving Government regulations; inquiry, 21991
Log export restrictions; policy, 13907, 39597
Meetings:
Bridger-Teton National Forest Grazing Advisory Board, 56077
Caribou National Forest Grazing Advisory Board Committee, 51823
Cascade Head Scenic-Research Area Advisory Council, 24081
Coconino National Forest Grazing Advisory Board, 27873
Coronado National Forest Grazing Advisory Board, 51693
Gila National Forest Grazing Advisory Board, 54283, 60975
Gospel-Hump Advisory Committee, 46984, 53481
Humboldt National Forest Grazing Advisory Board, 14530, 51693
Malheur National Forest Grazing Advisory Board, 51823
Moyie River Wild and Scenic River study; hearings, 31188
National Forest System Advisory Committee, 19252, 36988
National Grasslands grazing fees review, 53481
Pacific Crest National Scenic Trail Advisory Council, 21027, 25839, 26599, 42287
Prescott National Forest Grazing Advisory Board, 55810
Priest River Wild and Scenic River study; hearings, 31189
Scientists Committee, National Forest Management Act, 2645, 3922, 4874, 9834, 12897, 23007, 25701, 29023, 40895, 49028
State and Private Forestry Advisory Committee, 11728, 45910
Targhee National Forest Grazing Advisory Committee, 41063
Tonto National Forest Grazing Advisory Board, 31188, 55810
National Environmental Policy Act of 1969 (NEPA); implementation guidelines, 21254
Ozark National Forest; transfer of jurisdiction to National Park Service, 1520, 15345
Pesticide use; policy revision, 18725, 20828
Primitive areas; redesignation as class I; inquiry, 17990
Privacy Act; systems of records, 32843
Reforestation and timber stand improvement policy; proposed modification, 43506
Roadless Area Review and Evaluation (RARE II), inventory list, 6291, 24876, 45754, 48670, 58208
Roadless Area Review and Evaluation (RARE II), progress report, 41010
Roadless Area Review and Evaluation (RARE II), RPA relationships; availability, 57169
Timber sale and contract term extension; policy, 26599
Timber sale and disposal:
Lumber Price Trends Index, 30086, 35737, 42024
Special salvage timber program, 49028
Wilderness study areas:
Cranberry Wilderness Study Area, W. Va.; hearing, 33778
Helena and Deerlodge National Forests, Elkhorn Wilderness, Mont.; hearing, 26339
Jefferson National Forest, Mount Rogers National Recreation Area Planning Unit, Va., et al.; extention of time, 29155
Mendocino National Forest, Snow Mountain Wilderness Study Area, Calif., 29155
Shasta-Trinity National Forest, Mt. Shasta Wilderness Study Area, Calif., 29155
Sheep Mountain Wilderness Study Area, Calif.; hearing, 17020, 17378
Shoshone National Forest, Washakie Wilderness, Wyoming; hearing, 8574

## GAS

*See Economic Regulatory Administration.*
*Federal Energy Regulatory Commission.*
*Geological Survey.*
*Land Management Bureau.*
*Pipeline Safety Regulation Office.*

## GENERAL ACCOUNTING OFFICE

**RULES**

Claims for erroneous payment of pay and allowances; standards for waiver; procedure, 56011
Labor-management relations program, Federal; procedures for decisions on appropriated fund expenditures, 32395

**PROPOSED RULES**

Federal labor-management relations program; appropriated fund expenditures, decision procedures, 14318

**NOTICES**

Regulatory reports review; proposals, approvals, etc., 1653, 1994, 1995, 3314, 3315, 3438, 3943, 4113, 6164, 7268, 8038, 8300, 9206, 9534, 10441, 10734, 11603, 13435, 14361, 14539, 14735, 15366, 15500, 16226, 16407, 16550, 18252, 19922, 21380, 21725, 21945, 23653, 23760, 24595, 24596, 24913, 26350, 26797, 28047, 28553, 29989, 30347, 31435, 31990, 32463, 33325, 33964, 34210, 34843, 35547, 36142, 36516, 37011, 37219, 37761, 38746, 39175, 39607, 39855, 41087, 41273, 42041, 44886, 45477, 47014, 50245, 51449, 51725, 51726, 51845, 52519, 52773, 53497, 53820, 54141, 54989, 55284, 55285, 57187, 57657, 58433, 58628, 59550, 60227, 61001

## GENERAL SERVICES ADMINISTRATION

*See also Federal Preparedness Agency.*
*Federal Property Resources Service.*
*Federal Register Office.*
*Federal Supply Service.*
*National Archives and Records Service.*
*Public Buildings Service.*

**RULES**

Procurement, Federal:
ADP and telecommunications; major system acquisitions; temporary regulations, 41045
Advertising, negotiation, etc.; late bids and proposals, 31331
Cost accounting standards; National defense contracts and negotiated non-defense contracts, 14108, 21038
Cost-reimbursement-type contractors, authorization to use GSA supply sources; copy requirement eliminated, 7318
Energy conservation in Government purchasing, 14315
Fair and equitable compensation to professional employees under contract, 27235, 30539
Forms; late bids and proposals; correction, 35310
Forms, new edition, 6946
Labor, Service Contract Act requirements, 11987
Patents; institutional agreements, in contracts with universities and nonprofit organizations, 4424, 16979, 32463, 53497
Price negotiation policies and techniques, 11986
Proposal evaluations and contract pricing; negotiations, 46302
Recovered materials; use in procurement, 53729
Small business and labor surplus policies and procedures, 26004
Small purchase procedures and schedule contracts for ADP requirements, 40016
Vendor prepaid transportation charges, 49793
Property management, Federal:
ADP and telecommunications management; CFR Parts transferred, etc., 27190, 27191
ADP and telecommunications management; standard terminology, 55404
ADP and telecommunications management; standards, 34141
ADP equipment, exchange/sale, acquisition of, 15366
ADP management; reutilization of ADPE and supplies, 50177
ADP teleprocessing services program; extension of expiration date, 45842
Automobiles, procurement, 32767
Buildings and grounds management; conduct on Federal property, 29002
Buildings operations, maintenance, etc.; parking for drivers of handicapped employees, 8139
Centralized household goods traffic management, 58818
Credit for returned items, 32768
Donation of personal property; eligibility, 38008
Energy conservation policy, 8800
Federal buildings fund; billing procedures for reimbursable charges, 11820
Federal catalog system, form 1303, 18673

Federal catalog system; supply support requests, 42257
Handicapped, physically; accomodations, 16479
Household goods traffic management, 5436
Item reduction program, 4999
Laboratories, Federal; inventory establishment and use; CFR Part removed, 2722
Laboratory and research equipment management, 29004
Lead and zinc stabilization program; deletion, 30056
Motor equipment management; acquisition of fuel-efficient passenger automobiles, 50180
Motor vehicle accident investigation report, 5437
Motor vehicle data reporting, 5437, 51635
Motor vehicle pools, interagency; agency billing for dispatch service, 7207
Motor vehicles; acquisition of fuel-efficient light trucks, 54633
Motor vehicles, air-conditioning in; guidelines, 16480
Motor vehicles; display of Government tags, damages to vehicles, etc., 24062
Motor vehicles; U.S. Government tags and identification; exemptions from use, 49794
Office furniture and carpeting; use standards, 18673
Payments for supplies and services furnished government agencies, 21882
Personal property sale, abandonment, or destruction; bid submission by mailgram, 11820
Procurement sources and programs, 19852, 22210, 29005
Public buildings and space; work station, occupiable area, etc., 35484
Requisitions submitted for equipment to GSA regional office, 32765
Shipments; policy on reporting discrepancies in, 33713
Space and amenity standards for executive schedule and supergrade personnel, 34139
Stockpile, National; transfer of excess strategic and critical materials to and from, 30055
Strategic and critical materials, excess reporting of, 30056
Supply activity report, 40019
Supply schedules, Federal, and GSA Supply Catalog, 24533
Telecommunications, listening-in devices use; corrections, 3709
Telecommunications; survey of telephone station equipment, 27192
Telecommunications management; equipment replacement, 40228
Transportation payment data, reporting requirements, 54636
Travel regulations; temporary, 10442
Utilization and disposal of personal property; editorial changes, etc., 26575

**PROPOSED RULES**

Privacy Act; implementation, 43049
Property management, Federal:
Authority delegations; method of issuance, 17508
Federal facilities and space; improved utilization, 52502
Munitions list items, demilitarization, 31046
Telecommunications; exceptions to mandatory use of Federal standards, 52503
Telecommunications; listening-in devices, 27867
Transportation and traffic management; rate tenders to Government, 51817
Travel regulations, mileage reimbursement for privately owned automobiles, 16353

**NOTICES**

Administrative Services Reorganization Project; reports; availability, 24747
Advisory Committee Review; inquiry, 10671
Authority delegations:
Atomic Energy Commission Chairman et al., 8851
Defense Department Secretary, 1130, 1840, 3762, 5067, 7269, 7368, 8039, 8851, 9351, 11857, 22445, 26615, 28048, 43553, 43768, 50246, 52524, 55464
Interior Department Secretary, 1007, 46079
Transportation Department Secretary, 49564
Treasury Department Secretary, 9351, 21946
Committees; establishment, renewals, terminations, etc.:
Historic Preservation Task Force, 59905
President's Administrative Services Reorganization Project Advisory Committee, 9352, 20554, 26484
Real Estate Leasing Procedures Advisory Committee, 4172
Real Estate Matters Advisory Panel, 27609
Stockpile Disposal Policies Advisory Panel, 34543
Environmental policy implementation; Public Buildings Service facility planning programs; preparation procedures, 61001
Environmental statements under preparation:
Administrative actions list, 15192, 21035, 35106, 53497
Procedures, 35101, 52520
Federal space exchange program, establishment, 33326
Floodplain management and wetlands protection; procedures, 22309
Improving Government regulations, 22612, 53821, 56728
Interest rates on excessive profits by contractors, 9206
Meetings:
Architectural and Engineering Services Regional Public Advisory Panel, 3762, 10444, 12088, 15191, 17404, 18252, 21035, 25868, 26350, 27894, 31068, 31236, 33821, 33965, 34210, 36143, 39426, 40318, 43768, 44887, 52290, 55285, 55464
Archives Advisory Council, 16810
Health Resources National Advisory Committee, 9351
President's Administrative Services Reorganization Project Advisory Committee, 9352, 13097, 15191, 20056, 20554
Real Estate Leasing Procedures Advisory Committee, 4172
Real Estate Matters Advisory Panel, 27609
Stockpile Disposal Policies Advisory Panel, 36003
Privacy Act; systems of records, 22242, 38623, 43066, 53497, 56733
Privacy Act; systems of records; annual publication, 39938
Procurement, Federal:
Agreements available for use by executive agencies, 4170, 8182
Cost accounting standards; interim guidance, 21040
Cost accounting standards; negotiated National defense contracts, 14108, 21038
Cost Accounting Standards Board, identification of cognizant contracting officers, 59135
Fair and equitable compensation to professional employees under contract, 27235, 30539
Furniture trade associations; discussion, 55463
Interest rates on excessive profits by contractors, 9206, 33821
Patents, institutional agreements; effective date, 32463, 53497
Property management, Federal:
ADP and telecommunications requirements checklist, 8851
ADP equipment, exchange/sale, acquisition of, 15366
Authority delegation to Atomic Energy Commission Chairman et al., 8851
Authority delegation to Interior Department Secretary, oil and gas leases, 1007
Authority delegation to National Aeronautics and Space Administration Administrator, 31434
Authority delegation to Transportation Department Secretary, 49564
Authority delegations to Defense Department Secretary, 1130, 1840, 3762, 5067, 7269, 7368, 8039, 8851, 9351, 11857, 22445, 26615, 28048, 31236, 43553, 43768, 50246, 52524, 55464
Authority delegations to Interior Department Secretary, 46079
Authority delegations to Treasury Department Secretary, 9351, 21946
Designations and redesignations of Federal buildings; Hato Rey, P.R., 46908
Distribution of FPMR materials, 29032
Household goods traffic management, 5436
Motor vehicle accident report, 5437
Motor vehicle data reporting, 5437
Motor vehicles; Ford Pinto sedans; removal from service, 37762
Motor vehicles; fuel economy mileage information, 1979 FY vehicle acquisition forecasts, 57187
Telecommunications, listening-in devices use, 16551
Property transfer; wildlife conservation:
Huron Island Light Station; Marquette County, Mich., 27236
Public buildings and space; physical fitness facilities, installation, 56733
Public buildings and space; redesignation of Federal building in Beaumont, Tex., 5890
Public utilities; hearings, etc.:
California Public Utilities Commission, 1130, 2760, 10978, 59905
Federal Communications Commission; MTS and WATS market structure, 18768
Illinois Commerce Commission, 10978, 12088
Maryland Public Service Commission, 29033, 53821

Minnesota Public Service Commission, 5067
Missouri Public Service Commission, 20554, 43553
New Jersey Board of Public Utilities, 1130
New Mexico Public Service Commission, 28047
New York Public Service Commission, 29033, 31236, 51845
Ohio Public Utility Commission, 17049
Public Service Co. of New York, 25385
Public Utilities Commission of Colorado, 21726
Texas Public Utility Commission, 5066, 12756, 18768
Utah Public Service Commission, 25385
Virginia State Corporation Commission, 22242
Regulatory agenda; semiannual, 53821
Rulemaking proceeding interventions, proposed:
FCC; automatic dialing and recorded announcement devices, 17049
FCC; telephone conversations recording, 18252, 27236
ICC; transportation for disadvantaged persons; American Bus Association petition, 20554
Telecommunications, listening-in devices use; inventory list requirement, 16551
Travel, government:
Property management regulations, temporary, 10442

## GEOLOGICAL SURVEY

**RULES**
Coal-mining operating regulations:
Surface and underground reclamation standards on Federal lands, State-Federal cooperative agreements, civil penalties, etc., 37186, 49009
Exploration, development, and production; royalty computation, general mining orders issuance, 10341
Geothermal resources operations; public, acquired, and withdrawn lands; well and exploration procedures simplified, 13833
Outer Continental Shelf; oil, gas, and sulphur operations:
Environmental reports; suspension, 50903
Exploration, development and production activities; information to States, 3883
Oil and gas information program, 3889

**PROPOSED RULES**
Coal-mining operating regulations:
Surface and underground reclamation standards on Federal lands, State-Federal cooperative agreements, civil penalties, etc.; extension of time, 781
Geothermal resources operations; public, acquired, and withdrawn lands:
Steam power facilities, 4264, 12892
Outer Continental Shelf; oil, gas, and sulphur operations:
Air emissions control; advance notice, 60612
Exploration, development and production activities; list of affected States, 24710
Oil and gas information program; list of affected States, 24710

**NOTICES**
Authority delegations:
Chief, Conservation Division; appeals, 53064
Coal land classifications:
Colorado, 9658, 10982, 54700
New Mexico, 38947
Utah; correction, 10983
Wyoming, 36519
Coal leasing areas:
Montana, 10982, 12095, 24748, 56282
New Mexico, 14549, 14550, 33828, 41297, 50510
North Dakota, 14549, 24748, 33828, 46384
Oklahoma, 30623, 30624, 41298
Wyoming, 14550
Coal leasing orders:
Federal, recoverable reserves; reporting system, 29631
Coal mining plans:
Colorado, 9362
Environmental statements; availability, etc.:
Big Sky Mine, Mont., 59138
Caballo Mine, Campbell County, Wyo., 46910
Coal mining, Campbell County, Wyo., 38631
Coal resources development, Utah, 36333, 49857
Pronghorn Mine, Campbell County, Wyo., 30000, 34217
Spring Creek Mine, Big Horn County, Mont., 36333
Geothermal resource areas, operations, etc.:
California, 20564, 30001
Idaho, 50744
New Mexico, 40321
Oklahoma, 19924
Utah, 4465
Meetings:
Earthquake Studies Advisory Panel, 13102, 53065
Mental Retardation, President's Committee, 13635
Safety and pollution-prevention equipment standards, 15014
Water Data for Public Use Advisory Committee, 50509
Oil and gas operations:
Contract research and development program; inquiry, 42047
Oil spillovers, etc.; Federal and Indian onshore leases; reports, 20060
Royalty accounting reports; Federal and Indian onshore leases; natural gas, 10982
Outer Continental Shelf; oil and gas operations:
Hydrogen sulfide environment drilling operations, safety requirements, 28857
Oil and gas leasing; Gulf of Mexico; disposal of royalty oil, 7271
Oil and gas leasing; North Atlantic area, 2702, 3177, 6328
Oil and gas leasing; South Atlantic area, 6329
Oil and gas operations; safety and pollution-prevention standards program; generic quality control system standard for equipment manufacture and testing, 39, 4691
Platforms, structural integrity verification; inquiry, 56945
Production platform operators; safety device (FIRS), 24915
Safety and pollution-prevention equipment standards; meeting, 15014
Summary reports, proposed preparation, 37771
Well-control equipment drilling techniques; personnel training and qualification, 8040, 59551
Phosphate leasing areas:
Grays Range-Wooley Range, Idaho, 35557
Idaho, 39445
Paradise Valley, Idaho, 38473
Potash leasing areas:
New Mexico, 36143
Sodium leasing areas:
Wyoming, 57350

## GOVERNMENT EMPLOYEES

*See Civil Service Commission.*
*Labor Management Services Administration.*

## GOVERNMENT NATIONAL MORTGAGE ASSOCIATION

**RULES**
Attorneys-in-fact, list, 1792, 30276
Mortgage-backed securities program; increase of net worth requirements, 60898
Purchase requirements:
Mortgage purchases; maximum mortgage amount limitation increase, 60444

**PROPOSED RULES**
Mortgage-backed securities program; increase of net worth requirements, 27486, 30574
Mortgage-backed securities program; modified pass-through program for graduated payment mortgages, 60957

**NOTICES**
Legal services, attorney approval; application procedure, 27246

## GOVERNMENT PRINTING OFFICE

**NOTICES**
Meetings:
Depository Library Council, 10617, 38472
Micropublishing Advisory Council, 10617, 27609, 37762, 58231

## HANDICAPPED

*See Blind and Other Severely Handicapped, Committee for Purchase from.*
*Education Office.*
*Health, Education, and Welfare Department.*
*Social Security Administration.*

## HAZARDOUS MATERIALS OPERATIONS OFFICE

*See Hazardous Materials Regulation Office.*

## HAZARDOUS MATERIALS REGULATION OFFICE

**RULES**
Aircraft, carriage by:
Asbestos, 56668
Blasting agents, 57903
Exemptions, individual; conversion to regulations of general applicability, 39792
Hazardous materials regulations; editorial amendments, 48643, 51020
Hazardous materials table and communications regulations:
Asbestos, 56667
Blasting agents, 57900, 60472

CFR errata sheet availability, 32416
Exemptions, individual; conversion to regulations of general applicability, 8519, 17943, 39790, 57892
Packagings, use for specific hazardous materials, 31139, 35485
Placards; extension for anhydrous ammonia in nurse tanks, 24845
Placards; mandatory compliance date extension; correction, 970
Radioactive materials imported into U.S., 10917
Hazardous materials transportation; information, definitions, etc.:
Explosives Bureau; authority delegations withdrawn, 36446
International Maritime Dangerous Goods Code; incorporation by reference, 24845
Highway, carriage by:
Asbestos, 56668
Blasting agents, 57904
Exemptions, individual; conversion to regulations of general applicability, 17945, 17946
Motor carrier safety regulations, Federal; incorporation by reference, 4859
Packagings, use for specific hazardous materials, 31143
Vehicle maintenance and repair, 41403
Rail, carriage by:
Asbestos, 56668
Blasting agents, 57903
Exemptions, individual; conversion to regulations of general applicability, 8522, 17945
Packagings, use for specific hazardous materials, 31143
Shippers:
Asbestos, 56668
Blasting agents, 57902, 60472
Exemptions, individual; conversion to regulations of general applicability, 8521, 9149, 17944, 17946, 21462, 39791, 57893, 60472
Explosives Bureau; authority delegations withdrawn, 36446
Methane; transportation in specification 3AX, 3AAX, and 3T cylinders, 13382, 21461
Metric equivalence for quantity limitations, 56044
Packagings, use for specific hazardous materials, 31140, 35485
Pressure tank cars, uninsulated; retrofit program, 30061
Tank cars, Canadian, empty; return to Canada, 6786
Shipping container specifications:
Exemptions, individual; conversion to regulations of general applicability, 17946
Explosives Bureau; authority delegations withdrawn, 36446
Manhole assemblies and certification plates on cargo tanks, location, 58820
Packagings, use for specific hazardous materials, 31143
Polyethylene drum packaging, 29563
Tank car specifications:
Compliance reporting, 39793
Couplers; approved list expanded, 7436
Exemptions, individual; conversion to regulations of general applicability, 8523, 17946
Pressure tank car tanks, 2181
Retrofit program; uninsulated pressure tank cars, 30061
Vessels, carriage by:
Asbestos, 56668
Blasting agents, 57903
Exemptions, individual; conversion to regulations of general applicability, 8522, 39792

**PROPOSED RULES**

Aircraft, carriage by:
Asbestos, 8562
Civil and government-owned aircraft, 57928
Detonators, commercial, and detonating primers, 19242
Exemptions, individual; conversion to regulations of general applicability, 24335
Waste materials, hazardous; transportation, 22626
Hazardous materials program procedures:
Designation of approval agencies, 58050
Hazardous materials aboard civil aircraft, 57928
Hazardous materials table and communications regulations:
Asbestos, 8562
Compressed gas packages, color coding; termination, 46050
Detonators, commercial, and detonating primers, 19242
Exemptions, individual; conversion to regulations of general applicability, 24335, 39835, 58834
Forbidden materials; additions to table; inquiry, 7449
Lead dross and metal borings or shavings, 56070
Waste materials, hazardous; transportation, 22626
Hazardous materials transportation; information, definitions, etc.:
Exemptions, individual; conversion to regulations of general applicability, 24335
Waste materials, hazardous; transportation, 22626
Highway, carriage by:
Asbestos, 8562
Detonators, commercial, and detonating primers, 19242
Exemptions, individual; conversion to regulations of general applicability, 983
Radioactive materials, routing; inquiry, 36492
Radioactive materials, routing; inquiry; hearing, 50006
Waste materials, hazardous; transportation, 22626
Rail, carriage by:
Asbestos, 8562
Detonators, commercial, and detonating primers, 19242
Exemptions, individual; conversion to regulations of general applicability, 983
Waste materials, hazardous; transportation, 22626
Shippers:
Cylinders, compressed gas; visual inspection procedures, record retention, etc., 1369
Detonators, commercial, and detonating primers, 19242
Exemptions, individual; conversion to regulations of general applicability, 983, 24335, 39835, 58834
Import and export shipments, 56070
Intermodal portable tanks, 58050
Lead dross or scrap, ferrous metal borings, etc.; shipment by water, 56070
Pressure tank car tanks construction; withdrawal, 3598
Pressure tank cars, uninsulated; retrofit program, 20250
Shipment and packaging requirements; asbestos, 8562
Shipment and packaging requirements; metric equivalence for quantity limitations, 28216
Waste materials, hazardous; transportation, 22626
Shipping container specifications:
Cylinders, seamless; flattening test requirement, 2741
Detonators, commercial, and detonating primers, 19242
Exemptions, individual; conversion to regulations of general applicability, 58834
Exemptions, individual; conversion to regulations of general applicabilty, 983
Intermodal portable tanks, 58050
Tank car specifications:
Compliance reporting, 24865
Pressure tank car tanks construction; withdrawal, 3598
Retrofit program; uninsulated pressure tank cars, 20250
Vessels, carriage by:
Asbestos, 8562
Barges, special requirements, etc., 56070
Detonators, commercial, and detonating primers, 19242
Exemptions, individual; conversion to regulations of general applicability, 24335
Intermodal portable tanks, 58050
Waste materials, hazardous; transportation, 22626

**NOTICES**

Applications; exemptions, renewals, etc., 1864, 1868, 1869, 4475, 6858, 6860, 6862, 11000, 12776, 15511, 15512, 16837, 20289, 20290, 22476, 26811, 26812, 28878, 30156, 31254, 31256, 32487, 37050, 37051, 37787, 37791, 44582, 44583, 47629, 47630, 51163, 54153, 54154, 57362, 59575
Dangerous goods transportation; meeting, 20883, 39882
Inconsistency rulings; applications, etc.:
Associated Universities, Inc., 16954, 24932
Railroad Commission of Texas, 24930
Meetings
Dangerous goods transportation, 20883, 39882
Shipping container specifications:
Cylinders, DOT 3T; precaution statement, 9211, 11638
Tank cars; excepted thermal protection systems; list, 51162

## HAZARDOUS SUBSTANCES

*See Coast Guard.*
*Consumer Product Safety Commission.*
*Environmental Protection Agency.*
*Hazardous Materials Regulation Office.*

*Materials Transportation Bureau.*
*Occupational Safety and Health Administration.*

## HEALTH

*See Alcohol, Drug Abuse, and Mental Health Administration.*
*Animal and Plant Health Inspection Service.*
*Disease Control Center.*
*Food and Drug Administration.*
*Health, Education, and Welfare Department.*
*Health Resources Administration.*
*Health Services Administration.*
*Mine Safety and Health Administration.*
*Mining Enforcement and Safety Administration.*
*National Institutes of Health.*
*Occupational Safety and Health Administration.*
*Public Health Service.*
*Social Security Administration.*

## HEALTH, EDUCATION, AND WELFARE DEPARTMENT

*See also Alcohol, Drug Abuse, and Mental Health Administration.*
*Child Support Enforcement Office.*
*Disease Control Center.*
*Education Office.*
*Educational Statistics, National Center.*
*Food and Drug Administration.*
*Health Care Financing Administration.*
*Health Resources Administration.*
*Health Services Administration.*
*Human Development Services Office.*
*Museum Services Institute.*
*National Institute of Education.*
*National Institutes of Health.*
*Public Health Service.*
*Saint Elizabeths Hospital.*
*Social Security Administration.*

### RULES

Conduct standards; FDA supplement, 7619
Drugs, limitation on payment or reimbursement:
  Maximum allowable cost; Pharmaceutical Reimbursement Advisory Committee abolished, 35311
Grant appeals process:
  Emergency school aid; assistance termination grounds and procedures, etc., 36250
  Public assistance programs; Social Security Act disallowances reconsidered, 9265
Grant programs, public and medical assistance; cost of ADP equipment and services, 44853, 53039
Grants, administration:
  Nongovernmental grantees, extension of applicability and general revision, 34076
Human subjects, protection:
  Fetuses, pregnant women, in vitro fertilization, etc., 1759
  Informed consent; advice on compensation, 51559
  Prisoner research, 53655
Indian health; employment preference; definition of Indian, 29783
Nondiscrimination:
  Handicapped in federally-assisted programs; enforcement coordination, 2136
Privacy Act; implementation, 40229
Procurement, 6772, 33712, 39778, 48998, 48999, 49001, 54250
Surplus personal property; allocation and utilization for educational, public health, and civil defense purposes; CFR Part removed, 50183
Surplus property; minimum standards of operation for State agencies; CFR Part removed, 50183

### PROPOSED RULES

Day care requirements; Federal interagency, 17843
Drugs, limitations on payment or reimbursement:
  Maximum allowable cost; list, 24988
  Maximum allowable cost; Pharmaceutical Reimbursement Advisory Committee abolished, 25450
Grant appeals process:
  Emergency school aid; assistance termination grounds and procedures, etc., 1968
Human subjects, protection:
  Children, research involving, 31786
  Institutionalized as mentally disabled; research, 53950
  Institutionalized mentally infirm; advance notice, 17375
  Prisoner research, 1050
Intergovernmental Personnel Act Programs:
  Personnel administration merit systems; standards, 20996
Nondiscrimination:
  Age discrimination in federally-assisted programs, 8756, 28855, 56428, 56445
  Race, color, national origin, sex, and handicap in vocational education programs, 59105
  Sexual discrimination in federally-assisted programs; codes of personal appearance, 58076
  Sexual discrimination in federally-assisted programs; intercollegiate athletics, policy interpretation, 58070
Procurement, 33761, 33940, 47217

### NOTICES

Advisory committee review, inquiry, 8855
Advisory committees; report availability:
  Health and Environmental Effects of Increased Coal Utilization, Committee, 2229
Aged and disabled, hospital services, inpatient, diem rates deductible, 44891
Aged and disabled, monthly hospital insurance premium; uninsured aged, premium rate, 61010
Aged and disabled, supplementary medical insurance:
  Actuarial and premium rates (July 1978 - June 1979); correction, 3175
  Actuarial and premium rates (July 1979-June 1980), 61010
  Items and services subject to lowest charge level criteria, 32335
Civil rights; desegregation of State public higher education systems; acceptable plans criteria, 6658
Committees; establishment, renewals, terminations, etc.:
  Education Statistics Advisory Council, 47793
  Health Care Technology Study Section et al., 49369
  National Professional Standards Review Council, 12951
  Women, Rights and Responsibilities, Secretary's Advisory Committee, 22077
Contract awards:
  Abt Associates, Inc.; monthly retrospective reporting studies, 51451
  Aspen Systems Corp.; "Project Share," human services policy research project, 51452
  Colorado Department of Social Services; Denver income maintenance experiment, 51846
  JWK International Corp.; survey of income and program participation, 51846
  Mathematics Policy Research, Inc.; Gary income maintenance experiment, 51451
  Moshman Associates, Inc.; survey of income and program participation, 51846
  Survey Research Laboratory; pension equity measurement, 51452
  University of Michigan Regents; panel study of income dynamics, 56281
  Washington State Department of Public Assistance; Seattle income maintenance experiment, 51846
Day care requirements, Federal interagency; appropriateness evaluation; meetings, 6166
Guaranteed student loan program; Project Cross Check (Phase III); defaulted loans, 46909
Human subjects, protection:
  Children, research involving; report availability and inquiry, 2084
  Institutional Review Boards; report and recommendations, 56174
  Institutionalized mentally infirm; research; report and recommendations, 11328
Improving Government regulations; inquiry, 23119, 24212
Indian Health Scholarship Program; authority delegation, 18267
Influenza, strain A/USSR/1977; immunization policy; meeting, 3627
Information collection and data acquisition activity, description; inquiry, 1007, 6326, 10617, 13920, 16408, 19453, 23654, 25476, 27239, 29830, 32861, 36326, 37492, 39181, 42784, 49367, 50506, 53059, 54996, 57660, 60227
Meetings:
  Child and Family Development Research Review Committee, 33347
  Day care requirements, Federal interagency; appropriateness evaluation, 6166
  Education Statistics Advisory Council, 1654, 18127, 43566, 54699
  Federal Council on Aging, 29189
  Fund for Improvement of Postsecondary Education, Board of Advisors, 3627, 17543, 22451, 40320
  Health Care Technology Study Section et al., 22076
  Health Research Principles, National Conference, 42044
  Health Services Developmental Grants Study Section et al., 7048
  Influenza, strain A/USSR/1977; immunization policy, 3627
  Mental Retardation, President's Committee, 19466, 28048, 49576, 52291, 61016
  National Health Insurance Issues Advisory Committee, 2943

National Professional Standards Review Council, 7372, 16811, 26484, 37223
Physical Fitness and Sports; President's Comittee, 52291
Protection of Human Subjects of Biomedical and Behavioral Research, National Commission, 1010, 3439, 7709, 12951, 19294, 35113
Records and Statistics, Public Health Conference on, 10980
Services and Facilities for the Developmentally Disabled National Advisory Council, 38115
Social Security Advisory Council, 22245, 26797
Vital and Health Statistics National Committee, 14539, 24143, 28563, 33966, 37012, 40318, 52061, 52062
Women, Rights and Responsibilities, Secretary's Advisory Committee, 1409, 4687, 5896, 10636, 15366, 15367, 21737, 21738, 30131, 33347, 34212, 37013, 43389, 49057, 54998
Meetings; Sunshine Act, 60, 4915, 19499, 32026
National Health Service Corps Scholarship Program; designation of health specialties, 21059
Nondiscrimination:
Age discrimination in programs receiving Federal financial assistance; status report, 28855
Federally-assisted programs, FY 1978 annual operating plan, 7048
Federally-assisted programs, FY 1979 annual operating plan; inquiry, 39262, 47015
Federally-assisted programs; policy determinations, 18630
Federally-assisted programs, Title IX; inter-collegiate athletics, 18772
Handicapped in Federally-assisted programs; policy interpretations, 36034
Organization, functions, and authority delegations:
Assistant Secretary for Management and Budget; certification of true copies, 58870
Civil Rights Office, 40927
Consumer Affairs Office, 50046
Departmental Grant Appeals Board, 20561
Disease Control Center, 26139, 49369
Education, Assistant Secretary, et al., 20558, 54141
Education Office, 47290
Education Office; regional offices, 1134
Education Office, vocational education, 7709
Facilities Engineering Office, 2764
Food and Drug Administration, 1136, 16418
General Counsel et al.; certification of true copies, 58871
General Counsel Office, 27245
Grant and Contract Financial Management Office, 23017
Health, Assistant Secretary for, et al.; correction, 9868
Health, Assistant Secretary for, et al.; emergency medical services systems, 16423
Health, Assistant Secretary for, et al.; Indian Health Scholarship Program, 18267
Health Care Financing Administration, 5573, 5574, 5578, 39177
Health Care Financing Administration; Administrator, order of succession, 26350
Health Resources Administration, 1137
Human Development Services Office, 33327
Inspector General Office, 50508, 58871
Intergovernmental Affairs, Office of Deputy Under Secretary, 4686
Legislation Assistant Secretary et al., 34213
Management Analysis and Systems Office, 43389
National Institute of Education, 23761
National Institutes of Health, 4114, 41439, 47285
Personnel Administration, Office of Assistant Secretary, 48018
Planning and Evaluation, Office of Assistant Secretary, 2764, 30131, 40925
Program Integrity Office, 50509
Public Affairs Office, 3946, 52062
Public Health Service, Regional Offices, 53061
Secretary; order of succession, 16425
Social Security Administration, 32873, 40933, 55286
Social Security Administration, Commissioner, 25385
Social Security Administration; External Affairs Office, 35113
Social Security Administration; Hearings and Appeals Bureau, 23017, 26615
Social Security Administration; Management and Administration Office, 14132, 37494
Social Security Administration; Program Operations Office, 16424
Privacy Act; systems of records, 1135, 2668, 3175, 9354, 9355, 15786, 19079, 28253, 42307, 49770, 51847, 58637, 61008
Privacy Act; systems of records; annual publication, 44102
Program results:
Activated patient concept projects, 29999, 31239
Cash equivalent of in-kind income, 6657
Poverty and school crime, theoretical perspectives, 18267
Wealth components; methods of collection, measurement, and valuation, 56942
Radiation protection guidance to Federal agencies for diagnostic x rays, 4377
Records and Statistics, Public Health Conference on, 10980
Social security and supplemental security income; cost-of-living increases, benefits and limitations, 20867
Social Security benefits computation; table of average total wages year by year, 61016
Social security contribution and benefit base increase, 11859, 53504
Telecommunications demonstration program, grant awards, 7271, 25876

## HEALTH CARE FINANCING ADMINISTRATION

### RULES

Aged and disabled, health insurance for (Medicare):
Health maintenance organizations, grievance procedure requirements, 5826
Health maintenance organizations, reimbursement of reinsurance costs for risk-basis, 5823
Laboratories in medicare hospitals; quality control and proficiency testing standards, 7985
Medical services, supplies, and equipment; lowest charge level, 32299
Medicare program; obsolete CFR regulations deleted, 4428
Nomenclature change; correction, 6605
Organ procurement, histocompatibility testing and home dialysis equipment reimbursement, 58373
Overpayment claims, collection and compromise, 59381
Renal disease, end stage services; kidney transplantation centers, 35698
Renal disease, end-stage services; coverage of dialysis supplies, 49721
Renal disease, end-stage services; eligibility, 44803
Renal disease, end-stage services; self-dialysis requirements, 48950
Rural health clinic services, 8261, 30526
Medical assistance programs (Medicaid):, 45189
Abortions; Federal financial participation in State claims, 4580, 4833, 18679, 31868
Assistance amount, duration, and scope, 9810
Eligibility coverage and conditions, 9813, 20009, 44530
Inpatient hospital services; cost reimbursement, 8804
Medicaid claims processing systems; anti-fraud and abuse, 9817
Medicaid contracts, State, 5828
Medicaid provider claims; prohibition against reassignment, 8801
Medicaid quality control systems; information requirements expansion, 13575
Medical services, supplies, and equipment; lowest charge level, 32300
Nomenclature change; correction, 6605
Psychiatric facility/program certification, inpatient, for individuals under twenty one, 7986
Reorganization and rewrite of regulations, 45187
Reorganization and rewrite of regulations; correction, 57254
Rural health clinic services, 30527
Skilled nursing and intermediate care facilities; reimbursement for services, 4861
State medicaid fraud control units, 32078
State medicaid fraud control units; matching Federal funds for investigations, 3120
Sterilizations, Federal financial participation in State claims, 52171
Professional standards review:
Alternate PSROs; criteria and selection factors, 44850
Area designations; California, 55936
Area designations; Maryland, 2630
Area designations; North Carolina, 49307
Area designations; Texas, 44531
Criteria for designation of Statewide areas, 29005
Grants; eligibility criteria for PSRO's, 32084
Health facilities certification; rural health clinic services, 30528
Health facilities certification; rural health clinics; certification conditions, 5375

Information, confidentiality and disclosure, by PSRO's, 2283
Review responsibility and authority of organizations, 7407
Statewide councils; advisory groups, 854
Public assistance programs:
Application, eligibility determination, and furnishing of assistance; information dissemination, 6950
Social Security Act disallowances reconsidered, 9266
Staff development; correction, 20009

PROPOSED RULES

Aged and disabled, health insurance for (Medicare):
Automatic extinguishment systems for long-term care facilities, 57166
Beneficiary liability for nonreimbursable services or items, 57307
Claims reassignment by providers and suppliers; prohibition, 37469
Clinical laboratory technologist or cytotechnologist proficiency examination, 33763
Contracts with health maintenance organizations (HMOs); advance notice, 2412
Cost to related organizations; reimbursement, 36488
Cost to related organizations; reimbursement; advance notice, 50716
Disclosure of information and access to provider records, 34710
End-stage renal dialysis, coverage conditions; physical environment, requirement revocation, 51822
Fiscal intermediary nominations contracts, evaluations, and notices, 52256
Hospital insurance; entitlement, deductible, and coinsurance requirements; advance notice, 38058
Hospitals; conditions of participation; advance notice, 38058
Intermediaries and carriers, 52256
Medical equipment, payment for; advance notice, 2740
Medicare intermediaries; advance notice, 2740
Membership on boards of directors of carriers, intermediaries, and fiscal agents; inquiry, 27215
Nonreimbursable expenses; reduction in grace period days for payment, 24332
Patient's personal funds, protection, 39154
Payment for durable medical equipment, 58390
Provider claims, prohibition against reassignment; advance notice, 2412
Provider fraud; procedures for withholding of payments; advance notice, 50717
Provider records, information disclosure and access; advance notice, 780
Provider reimbursement review board decision, review; advance notice, 38058
Renal disease program, end-stage; advance notice, 37721
Rural health clinic services; advance notice, 2412
Skilled nursing and intermediate care facilities; conditions of participation; advance notice, 38058
Skilled nursing and intermediate care facilities; meetings, 24873
Suspension of physicians and other individual practicioners; advance notice, 780, 24988
Utilization review withdrawn, 24715
Drugs, maximum allowable cost (MAC); list, 30584
Medical assistance programs (Medicaid):
Automatic extinguishment systems for long-term care facilities, 57166
Benefits assignment and collection of medical support and payments, 38668
Eligibility coverage and conditions, 29970
Eyeglasses and hearing aids, reimbursement; inquiry, 38877
Fiscal disallowance for erroneous payments, 29311, 36478
Fraud; verification of services; advance notice, 50717
Grants to States, 38345
Information disclosure and access to provider records, 34710
Medicaid, State; rural health clinic services, 13860
Medicaid claims, benefit notices; advance notice, 2741
Medicaid claims, processing; advance notice, 2740
Medical payments, assignment of rights; advance notice, 2740
Membership on boards of directors of carriers, intermediaries, and fiscal agents; inquiry, 27215
Patients' personal funds, protection, 39154
Provider claims, prohibition against reassignment; advance notice, 2412
Provider fraud or abuse, evidence of; procedures for overpayment recovery, withholding, and suspension or exclusion; advance notice, 50717
Provider records, information disclosure and access; advance notice, 780
Reimbursement method or level changes for health care services; public notice, 20516
Reorganization and rewrite of regulations; advance notice, 2413
Rural health clinic services; advance notice, 2412
Skilled nursing and intermediate care facilities; conditions of participation; advance notice, 38058
Skilled nursing and intermediate care facilities; meetings, 24873
State medicaid fraud control units; reimbursement; advance notice, 780
State residence requirements, 35077
Suspension of physicians and other individual practitioners, 780, 24988
Timely claims payment, 36656
Utilization control, 50922
Utilization review; withdrawn, 24715
Professional standards review:
Alternate PSROs; criteria and selection factors, 3796
Area designations; Illinois, 43475
Area designations; Texas, 29016
Criteria for designation of Statewide areas, 8813
Grants; eligibility criteria for PSRO's, 13970
Grants and designation procedures; advance notice, 2413
Sanctions on health care practitioners and providers of services, 2413, 47474
Public assistance programs:
Grants to States, policies and procedures; recodification; advance notice, 7672
Sterilizations funded by HEW; restrictions; correction, 2899

NOTICES

Aged and disabled, health insurance for (Medicare):
Contracting report; inquiry, 50970, 56102
Hospice projects; applications, 50376
Hospital costs; schedule of limits for cost-reporting periods, 1979 FY, 43558
Physical therapy services, schedule of guidelines, 46377
Physicians' services economic index (July 1978-June 1979), 28559
Respiratory therapy services, schedule of guidelines, 46378
Rural health clinic services reimbursement; screening guidelines, 42787
Committees; establishment, renewals, terminations, etc.:
Pharmaceutical Reimbursement Advisory Committee, 2004, 2760
Drugs, limitations on payment or reimbursement; maximum allowable cost:
Acetaminophen w/codeine tablets, etc.; hearing, 40547
Amoxicillin, etc., 38941, 42045, 56102
Doxepin HC 1, etc.; hearing, 36698, 45477, 47792
List, 30584
Meprobamate, etc., 57972
Papaverine, etc., 59436
Tetracycline HC1, propoxyphene HC1, chlordiazepoxide HC1, etc., 7714, 14128, 16425, 20872
Grants for research and demonstrations; FY 1978 funds availability, 15594
Health insurance program; schedule of limits for cost-reporting periods, 1978 FY; grace period extended, 25873
Health insurance program; schedule of limits for cost-reporting periods, 1979 FY, 25869
Improving Government regulations; inquiry, 23128
Medical assistance programs (Medicaid):
Contracting report; inquiry, 50970, 56102
Handbook of Public Assistance Administration Supplement D; revoked, 6165
Hospice projects; applications, 50376
Rural health clinic services reimbursement; screening guidelines, 42787
Meetings:
National Professional Standards Review Council, 49366
Pharmaceutical Reimbursement Advisory Committee, 7270, 9534
Privacy Act; systems of records, 10979, 12088, 22446, 22448, 22449, 52524
Professional Standards Review Councils, Statewide; nominations, designations, etc.:
California, 11857
Connecticut, 14126
Florida, 24142
Illinois, 19292
Indiana, 19292
Maryland, 14126
Massachusetts, 14127
Michigan, 3944
New York, 12950, 14127
North Carolina, 24142
Pennsylvania, 11858

Virginia, 3945
Professional Standards Review Organizations; nominations, designations, etc.:
Arizona, 2228
California, 55937
Minnesota, 4118
North Carolina, 2228
Ohio, 2228
Pennsylvania, 2228
Virginia, 2229, 3945
Rulings publication, establishment, 3944

## HEALTH RESOURCES ADMINISTRATION

RULES
Health planning, National guideleines, 13044

PROPOSED RULES
Health planning, National guidelines, 3056, 6272

NOTICES
Advisory committees; annual reports filed, availability, 1133, 49366, 50253, 53828, 55823
Area Health Education Center Programs; contracts, draft availability, 33823
Committees; establishment, renewals, terminations, etc.:
Graduate Medical Education National Advisory Council, 22786
Grants; availability
Allied health, 18265
Allied health personnel, advanced training traineeships, 18267, 55823
Dental auxillary training programs, 47285
Dental team practice, 48719
Dentistry, general practice; residency training, 32464
Emergency medical services training, 57194
General internal or pediatrics; residency training, 14744
Health administration graduate programs, 18266
Health careers opportunity program, 50741
Health professions financial distress; grants to schools, 42788
Health professions schools in financial distress, 12385
Physician assistant training programs, 55823
Predoctoral, graduate, and faculty development educational programs in family medicine, 47699
Public health schools, students traineeships, 18267
Public health schools and health administration graduate programs, 19462
Residency training in general internal medicine or general pediatrics, 55824
Start-up asssitance, 50741
Training U.S. citizen foreign medical students, 55824
Grants, nursing schools and nursing special projects; low income levels for determination of disadvantaged backgrounds, 27903
Health manpower shortage areas; designations; list, 30648, 44758, 61164
Health planning and development grants to States; population determinations; annual list, 40918, 44567
Health professions and nursing student loans; "low-income levels" for loan repayment, 18266
Health service areas:
Florida, 12089, 30898
Iowa, 30354
Kentucky, 58872
Nebraska, 30354
New Mexico; designation; correction, 6323
Ohio, 58872
Population determination; correction, 5891
Population determinations; annual list, 40920, 44567
Health systems agencies; application information, 20557, 48720
Medical and nursing school abortion/sterilization study; inquiry, 12952
Meetings:
Advisory Committees; February, 3766
Advisory Committees; March, 7715, 8853, 9534, 9867
Advisory Committees; April, 13632
Advisory Committees; May, 15780, 15781, 19923
Advisory Committees; June, 22076, 24143, 24606
Advisory Committees; August, 28561, 35396
Advisory Committees; September, 33965, 34844, 36517, 39180
Advisory committees; October, 46584
Advisory committees; November, 45645, 51144
Advisory committees; December, 53828
Advisory committees; January (1979), 58870, 59907
Resource Development Programs; Proposed Performance Standards for State Health Planning; availability, 8854
Shared schedule residency training positions; requirements, 9867
Urban and rural poverty areas; list; availability, 3767

## HEALTH SERVICES ADMINISTRATION

PROPOSED RULES
Health maintenance organizations, 11472

NOTICES
Advisory committees; annual reports filed, availability, 14128, 25193, 52775, 55466
Committees; establishment, renewals, terminations, etc.:
Maternal and Child Health Research Grants Review Committee, 41285
Grants; availability:
Community health services project, 17058
Family planning training, 9353
Genetic testing and counciling programs, 15781
Health maintenance organizations, 7708
Hemophilia treatment centers, 12383
Home health services, 12383, 19462
Indian health service areas, 8188
Maternal and child health and crippled children's services to institutions of higher learning, 26137
Maternal and child health training in institutions of higher learning, 5891
Sudden infant death syndrome program, 5892
Health maintenance organizations, qualified, 20560
Indian health service areas; grant and contract funds availability, 8188
Interagency Committee on Emergency Medical Services; report availability, 14128
Meetings:
Advisory Committees; January, 39, 2004
Advisory Committees; February, 1133, 3316, 4113
Advisory Committees; March, 8188
Advisory Committees, April, 13633
Advisory Committees; May, 15196, 15781, 16415, 20056, 20557
Advisory Committees; July, 28856, 29360
Advisory committees; August, 32189
Advisory Committees; October, 40548, 46079
Advisory Committees; December, 52775

## HEARINGS AND APPEALS OFFICE, ENERGY DEPARTMENT

PROPOSED RULES
Oil; administrative procedures and sanctions:
Distribution of refunds, 53256

NOTICES
Applications for exception:
Cases filed, 18605, 19707, 19710, 19712, 22233, 25356, 25359, 25361, 25855, 27578, 27579, 27884, 28032, 31978, 32172, 32173, 32853, 35097, 36298, 38922, 38923, 42293, 43376, 45470, 45472, 46364, 47268, 47269, 50241, 52048, 52050, 53093, 55450, 55458, 55460, 56932, 57344, 59542, 59543
Decisions and orders, 18602, 18609, 19705, 19707, 19709, 19710, 20835, 20839, 20842, 20843, 20848, 20850, 20853, 24571, 25175, 25361, 25362, 27885, 28850, 30335, 30851, 30857, 30859, 30862, 31063, 31979, 31980, 31982, 32851, 34837, 38548, 38912, 38916, 38918, 38920, 38921, 40054, 41085, 41266, 43366, 43368, 43371, 43372, 43373, 43765, 47267, 48692, 48694, 48696, 48701, 48704, 49357, 50238, 50240, 50490, 51499, 55277, 55451, 55452, 55453, 55455, 58406, 58407, 59425, 59426, 59427, 59545
Determination standards guidelines, 58514
Guidelines, 19446
Procedures, 47265
Applications for exception and stay:
Atlantic Richfield Co. et al.; hearing, 55819
Texaco, Inc., 60214
Crude oil entitlements program, exception applications:
California, hearing, 26558
Crude oil producers; ceiling price exceptions; hearings, 26792, 29354, 35384
Home heating oil No. 2; allocation and pricing regulations; hearing procedure rules, 17393, 20276, 24588
Home heating oil No. 2; regulatory action decision, availability, 55450
Oil; consent orders:
Gulf Oil Corp.; interim decision and inquiry, 38548, 41266, 45473

## HEARINGS AND APPEALS OFFICE, INTERIOR DEPARTMENT

RULES
Surface mining control and reclamation; procedures, 41974

NOTICES

Applications, etc.:
Bethlehem Mines Corp., 2773
Consolidation Coal Co., 2773
D. C. Coal Co., Inc., 1013
Electra Fuels, Inc., 8191
Fire Creek Coal Co., 2773
Gallia Coal Co., 8191
Hiysota Fuel Co., Inc., 9378
Imperial Coals, Inc., 1014
Industrial Generating Co., 2774
Island Creek Coal Co., 1014
Mid-Continent Coal & Coke Co., 8191
Morata Coal Co., 8192
National Mines Corp., 2774
Olga Coal Co., 8192
Ron Coal Co., 8193
Sewell Coal Co., 1015
Stansbury Coal Co., 8596
United States Steel Corp., 8193
Youghiogheny & Ohio Coal Co., 2775

## HERITAGE CONSERVATION AND RECREATION SERVICE

RULES

Historic preservation grant-in-aid projects, 40809, 57250

NOTICES

Authority delegations:
Chief, Branch of Registration, National Register, 39611
Environmental statements; availability, etc.:
Barrier islands protective plan; Atlantic and Gulf coasts, 54304
Liberty State Park, N.J., 11613
Missouri River, Mont.; National Wild and Scenic River system, 8196
Off-road vehicles on public lands, 17063
Owyhee River, Idaho and Oreg.; National Wild and Scenic Rivers System, 23021
Floodplains management and wetlands protection implementation procedures; inquiry, 47449
Historic Places National Register; additions, deletions, etc.:
Alabama, 2453, 4124, 6340, 8195, 9363, 11762, 14136, 15201, 16427, 18776, 19924, 24614, 24620, 26495, 29036, 29041, 32194, 38632, 39445, 39452, 40554, 42047, 45647, 45651, 46587, 49578, 51849, 51856, 54303, 56945, 60241
Alaska, 2453, 9363, 12952, 14135, 14136, 15201, 16427, 17543, 18775, 19776, 19924, 21059, 22086, 24614, 24620, 27904, 29036, 29041, 33829, 39445, 39450, 45651, 51850, 56945
Arizona, 3318, 5078, 6340, 9362, 9363, 14136, 18775, 18776, 24614, 24620, 25489, 29036, 29838, 30901, 33829, 36143, 38632, 39445, 40554, 45647, 45650, 51850, 56945, 56948, 59139
Arkansas, 6340, 9363, 10639, 14136, 18776, 24614, 26495, 29036, 33829, 39446, 39450, 39453, 40554, 45647, 49578, 51850, 56946, 56948, 58122
California, 43, 5078, 6340, 9363, 10639, 11762, 12952, 14136, 15201, 17543, 18775, 18776, 22086, 23020, 24614, 25489, 26495, 29035, 29036, 29041, 33829, 33831, 33832, 35115, 36143, 37231, 38632, 39446, 39450, 39452, 42047, 43568, 45647, 45650, 45651, 50745, 51850, 51854, 51855, 55470, 56946, 56948, 56949, 59139, 60241
Colorado, 6340, 7272, 9363, 10639, 14135, 15201, 16427, 18776, 22086, 24614, 29037, 29041, 33829, 38632, 39446, 39452, 45647, 51850, 51856, 56946, 56949, 59139
Connecticut, 9363, 14136, 15201, 18776, 22086, 24614, 24620, 29035, 29838, 33831, 39446, 39452, 39454, 40554, 47794, 49578, 50745, 51850, 51855, 52776, 55470, 56946, 56948, 58122
Delaware, 2453, 3318, 9363, 12952, 14135, 14136, 18775, 18776, 24614, 24620, 26495, 27904, 29035, 29037, 30901, 35115, 39446, 45647, 47794, 51850, 58122
District of Columbia, 2453, 4124, 9363, 10639, 12952, 14136, 22086, 24614, 29035, 33832, 39446, 45648, 51850, 51854
Florida, 5078, 9363, 14136, 21059, 24614, 26145, 29041, 30901, 32194, 33832, 38632, 39446, 39452, 42047, 43568, 45648, 51850, 51855, 54303, 56946
Georgia, 43, 7272, 8195, 9363, 14135, 14136, 16427, 18776, 19924, 24615, 24620, 25490, 26145, 26495, 29037, 29041, 29838, 30901, 32194, 33829, 39446, 39450, 39452, 40554, 42047, 45648, 45650, 51850, 51854, 52776, 54303, 55470, 56948, 56949, 58122, 59139, 60241
Guam, 56946
Hawaii, 5078, 6340, 9363, 18776, 19924, 24614, 25490, 27940, 29037, 33829, 39446, 39451, 39452, 40554, 45650, 46587, 51850, 56946
Idaho, 43, 5078, 8195, 9363, 14136, 17543, 18776, 22086, 24614, 29035, 29037, 29838, 30901, 33829, 37231, 39446, 39453, 40554, 42047, 45648, 45650, 47794, 51851, 56946, 56948
Illinois, 3318, 7272, 8195, 9363, 10639, 11762, 14136, 17543, 18775, 18776, 22086, 24614, 27904, 29037, 29838, 33829, 36144, 37231, 39447, 39451, 39452, 39454, 40554, 42047, 45648, 45650, 47794, 49578, 50745, 51851, 51855, 51856, 52776, 54303, 56949
Indiana, 43, 3318, 7272, 8195, 9363, 10639, 11762, 14136, 15201, 16427, 17543, 18776, 24614, 24620, 26145, 27904, 29037, 29041, 30901, 33829, 33831, 33832, 35115, 39450, 39452, 39454, 42047, 43568, 45648, 45650, 45651, 46587, 49578, 51851, 51855, 54303, 56946, 58122, 59139
Iowa, 43, 8195, 9362, 9363, 10639, 14136, 18776, 24614, 25490, 27904, 29037, 29041, 30901, 33829, 33831, 33832, 36144, 39447, 39450, 39451, 40554, 42047, 43568, 45648, 45651, 46587, 49578, 50745, 51851, 54303, 56946, 56948, 56949, 58122, 59139, 60241
Kansas, 9363, 14136, 18776, 29038, 33829, 33832, 35115, 36144, 39451, 40554, 45648, 51851
Kentucky, 4124, 9362, 9363, 14136, 18776, 24614, 24620, 25490, 26495, 29035, 29038, 29838, 30901, 32194, 33829, 35115, 38632, 39447, 39452, 39454, 45648, 51851, 51856, 52777, 54303, 56946, 56948, 56949, 56950, 58122, 59139
Louisiana, 8195, 9363, 11762, 14136, 15201, 18776, 19924, 21059, 22086, 24614, 27904, 29038, 29041, 30902, 32194, 33829, 36144, 39447, 45648, 45650, 49578, 51851, 51855, 55470
Maine, 18776, 4124, 8195, 9363, 10639, 11762, 14136, 16427, 18775, 24614, 26145, 29038, 29838, 33829, 38632, 39447, 51851, 54303, 56946, 59139
Maryland, 1548, 4124, 7272, 8195, 9363, 14135, 15201, 16427, 17543, 18775, 18776, 24614, 24620, 25490, 29038, 29041, 29042, 30902, 32194, 33829, 33832, 35115, 37231, 39447, 39452, 45648, 45651, 50745, 51851, 51854, 54303, 56946, 56948, 56949, 60241
Massachusetts, 3318, 6340, 8195, 9363, 11762, 14136, 16427, 18776, 24614, 24620, 25490, 29038, 29041, 30902, 33831, 35115, 37231, 38632, 39447, 39451, 42047, 45648, 46587, 49578, 51851, 51854, 60241
Michigan, 9363, 14136, 15201, 18776, 19924, 21059, 22086, 24614, 29038, 29041, 33829, 39448, 39451, 45650, 51851, 51854, 51855, 54303, 59139
Minnesota, 2453, 3318, 8195, 9362, 9363, 14136, 15201, 17543, 18776, 24614, 29038, 30902, 32194, 33829, 33832, 35116, 37231, 39448, 45648, 49578, 51852, 56949, 56950, 60241
Mississippi, 3318, 6340, 8195, 9362, 9363, 10639, 11762, 12952, 14136, 16427, 18776, 24614, 24620, 26495, 27904, 29035, 29038, 29838, 33829, 33832, 36144, 39448, 39452, 40554, 43568, 45648, 45652, 46587, 51851, 54303, 56946, 56950, 58122, 59139, 60241
Missouri, 8195, 9362, 9363, 14136, 15201, 18776, 19924, 24614, 24620, 25490, 26145, 29038, 29041, 33829, 33832, 35116, 37231, 38632, 39448, 39451, 39452, 39454, 40554, 45649, 51852, 51854, 51855, 51856, 56946, 56949, 58122
Montana, 9362, 9363, 10639, 14136, 18776, 22086, 29035, 29038, 29041, 29838, 39448, 39453, 40554, 45651, 45652, 49578, 50745, 51852, 51855, 51856, 55471, 56946, 56949, 60241
Nebraska, 6340, 9362, 9363, 10639, 11762, 14136, 18776, 21059, 24614, 29038, 33829, 33831, 35116, 36144, 37231, 39451, 39454, 51852, 52777, 55471, 56946, 56949, 59139, 60241
Nevada, 43, 9363, 14136, 18776, 21059, 24614, 29038, 29838, 32194, 33829, 38632, 39448, 50745, 59139, 60241
New Hampshire, 4124, 9363, 16427, 18775, 22086, 24620, 25490, 26495, 29035, 29038, 29041, 29838, 33831, 36144, 38632, 39448, 39451, 39453, 46587, 51852, 55471, 56946
New Jersey, 43, 4124, 6340, 8195, 9363, 12952, 14135, 14136, 18775, 18776, 21059, 22086, 24614, 27904, 29038, 29041, 32194, 35116, 37231, 39448, 39453, 40554, 43568, 45649, 45650, 46587, 50745, 51852, 51855, 51856, 56946, 56949, 56950, 60241
New Mexico, 3318, 7272, 9363, 10639, 11762, 14136, 18776, 19924, 22086, 24614, 25490, 29035, 29039, 29041, 32194, 33829, 37231, 39448, 39451, 42047, 45650, 45652, 46587, 49578, 50745, 51852, 51855, 52777, 55471, 56946, 58122, 60241
New York, 1548, 4124, 6340, 9363, 11762, 14135, 14136, 16427, 18776, 19924, 21059, 22086, 24614, 25490, 27904, 29036, 29039, 29041, 30902, 32194, 33829, 33832, 36144, 37231, 39448, 39451, 39453, 39454, 40554, 42047, 43568,

45649, 45650, 45651, 47794, 49578, 50745, 51852, 51855, 51856, 52777, 54303, 56946, 56949, 59139
North Carolina, 6340, 7272, 9362, 9363, 10639, 12952, 14135, 14136, 18776, 22086, 24614, 24620, 26495, 29036, 29039, 33829, 33830, 33832, 37231, 38632, 39448, 39451, 39454, 45649, 49578, 50745, 51852, 51856, 55471, 58122, 60241
North Dakota, 9363, 14136, 18776, 24620, 29039, 33829, 40554, 52777, 54303, 56947
Ohio, 43, 6340, 9363, 12952, 14136, 17543, 18776, 24614, 24620, 29039, 29040, 29041, 29838, 33829, 33832, 38632, 39449, 39451, 39453, 45649, 45651, 45652, 51852, 51856, 55171, 56947, 56950
Oklahoma, 2453, 7272, 8195, 9363, 10639, 14136, 18776, 19924, 21059, 24614, 29039, 29041, 33829, 35116, 39449, 39451, 39454, 43568, 45649, 45651, 51853, 54304, 55471, 56947, 59139
Oregon, 1548, 2453, 3318, 6340, 8195, 9363, 11762, 14136, 18776, 19924, 24614, 29036, 30902, 33829, 33832, 36144, 39449, 39451, 40554, 42047, 45651, 50745, 51853, 55471, 56947, 60241
Pennsylvania, 1548, 6340, 9362, 9363, 11762, 12952, 14135, 14136, 15201, 16427, 18776, 19924, 22086, 24614, 29039, 30902, 32194, 33829, 33831, 35116, 39449, 39451, 39453, 39454, 43568, 45649, 51853, 51856, 56947, 56950, 58123
Puerto Rico, 9363, 10639, 24614, 39453, 56949
Rhode Island, 43, 4124, 9363, 14136, 17543, 24614, 29039, 32194, 39453, 40554, 49579, 51853, 51854, 51855, 52777, 54304, 56947, 56950, 59139
South Carolina, 1548, 4124, 9363, 10639, 14136, 18776, 24614, 26495, 29036, 30902, 33831, 37231, 39449, 39451, 40554, 45649, 47794, 49579, 50745, 51853, 56947, 56949, 56950
South Dakota, 3318, 9362, 9363, 14136, 18776, 21059, 24614, 29039, 39449, 39451, 39453, 56947, 59139
Tennessee, 43, 7272, 8195, 9362, 9363, 10639, 11762, 14135, 14136, 15201, 16427, 18775, 18776, 19924, 21059, 22086, 24614, 24620, 26495, 27904, 29039, 29041, 33829, 35116, 37231, 39449, 39451, 39453, 39454, 40554, 42047, 45649, 45650, 45652, 46588, 47794, 51853, 56947, 56948, 56950, 58123, 59139
Texas, 43, 2453, 3318, 4124, 5078, 6340, 7272, 9362, 9363, 10639, 12952, 14136, 15201, 18776, 19924, 21059, 22086, 24614, 24620, 25490, 26495, 27904, 29036, 29040, 29041, 30902, 33829, 33831, 33832, 36144, 37232, 38633, 39449, 39451, 39453, 39454, 40554, 45649, 50745, 51853, 51855, 51857, 52777, 54304, 56947, 56949, 58123, 59140, 60241
Trust Territory of Pacific Islands, 9363, 14136, 18776, 33831, 39453
Utah, 43, 1548, 3318, 5078, 6340, 8195, 9362, 9363, 10639, 14135, 14136, 16427, 17543, 18776, 19924, 22086, 24614, 24620, 25490, 26495, 29036, 29040, 30902, 32194, 33829, 36144, 37232, 38633, 39449, 45649, 47794, 49579, 50745, 51854, 51857, 52777, 56947, 56950, 59140
Vermont, 9363, 10639, 14136, 15201, 17543, 18775, 19924, 21059, 22086, 26495, 29036, 32194, 33832, 35116, 36144, 39450, 39454, 43568, 45649, 45652, 51854, 51857, 52777, 56948, 56950, 59140, 60241
Virgin Islands, 7272, 14136, 18776, 24620, 29040, 33829, 39450, 39453, 45649, 46588, 51854
Virginia, 3317, 3318, 4124, 9363, 14136, 18776, 24614, 29036, 29040, 29838, 33829, 33832, 36144, 39450, 39451, 39453, 43568, 45649, 45651, 51854
Washington, 2453, 4124, 6340, 9363, 10639, 14136, 15201, 17543, 18776, 19924, 21059, 22086, 24614, 29040, 29041, 29838, 33832, 37232, 39450, 45651, 46588, 49579, 51854, 51857, 56948, 60241
West Virginia, 9363, 10639, 14136, 16427, 17543, 18875, 24614, 29040, 32194, 33829, 39450, 43568, 45649, 51854, 56948
Wisconsin, 3318, 5078, 6340, 7272, 8195, 9362, 9363, 11762, 12952, 14136, 16427, 17543, 18776, 21059, 24614, 24620, 27904, 29040, 29838, 37232, 39450, 39453, 39454, 42047, 45650, 45652, 46588, 51854, 51855, 52777, 56948, 56949, 56950, 59140, 60241
Wyoming, 1548, 5078, 9363, 12952, 18776, 24614, 29040, 33829, 33831, 38633, 39450, 39451, 42047, 45650, 51854, 52777, 56949
Historic Places National Register; annual republication, 5162
Natural Landmarks National Registry; list:
Alabama, 18049
Alaska, 18049
America Samoa, 18049
Arizona, 18049
Arkansas, 18049
California, 18049
Colorado, 18049
Connecticut, 18049
Florida, 18049
Georgia, 18049
Guam, 18049
Hawaii, 18049
Idaho, 18049
Illinois, 18049
Indiana, 18049
Iowa, 18049
Kansas, 18049
Kentucky, 18049
Maine, 18049
Maryland, 18049
Massachusetts, 18049
Michigan, 18049
Minnesota, 18049
Mississippi, 18049
Missouri, 18049
Montana, 18049
Nebraska, 18049
Nevada, 18049
New Hampshire, 18049
New Jersey, 18049
New Mexico, 18049
New York, 18049
North Carolina, 18049
North Dakota, 18049
Ohio, 18049
Oklahoma, 18049
Oregon, 18049
Pennsylvania, 18049
Puerto Rico, 18049
Rhode Island, 18049
South Carolina, 18049
South Dakota, 18049
Tennessee, 18049
Texas, 18049
Utah, 18049
Vermont, 18049
Virginia, 18049
Washington, 18049
West Virginia, 18049
Wisconsin, 18049
Wyoming, 18049

## HIGHWAYS

*See Federal Highway Administration.*
*Interstate Commerce Commission.*
*National Highway Traffic Safety Administration.*
*National Transportation Safety Board.*

## HISTORIC PRESERVATION, ADVISORY COUNCIL

**PROPOSED RULES**

Historic and cultural properties protection, 50651, 55417

**NOTICES**

Meetings, 1632, 2197, 5020, 7247, 8573, 8818, 17018, 20828, 29022, 30849, 33948, 37207, 37476, 40046, 52036, 60628

## HISTORY, HISTORIC PRESERVATION

*See American Battle Monuments Commission.*
*Historic Preservation, Advisory Council.*
*National Park Service.*

## HOUSING

*See Agency for International Development.*
*Farmers Home Administration.*
*Federal Home Loan Bank Board.*
*Federal Home Loan Mortgage Corporation.*
*Federal Housing Commissioner—Office of Assistant Secretary for Housing.*
*Housing and Urban Development Department.*

## HOUSING AND URBAN DEVELOPMENT DEPARTMENT

*See also Community Planning and Development, Office of Assistant Secretary.*
*Federal Disaster Assistance Administration.*
*Federal Housing Commissioner—Office of Assistant Secretary for Housing.*
*Federal Insurance Administration.*
*Government National Mortgage Association.*
*Interstate Land Sales Registration Office.*
*Neighborhoods, Voluntary Associations and Consumer Protection, Office of Assistant Secretary.*
*New Community Development Corporation.*

**RULES**

Conduct standards, 8256, 25815
Federal National Mortgage Association, operations; report requirements; examination and audit provisions, etc., 36211
Low-income housing:
Elderly and handicapped, loans, 8493
Fair market rents; existing housing, 2875, 35163
Fair market rents and contract rent automatic annual adjustment factors, 13183, 25604, 48629
Fair market rents and contract rent automatic annual adjustment factors; Calif. and N. J. market areas, 14457

Fair market rents and contract rent automatic annual adjustment factors; Guam and New Jersey, 24673
Fair market rents and contract rent automatic annual adjustment factors; Puerto Rico and New York, 46529
Housing assistance application review; funds allocation; areawide housing opportunity plans, 2363
Housing assistance applications; review procedures, 13511, 50641
Housing assistance payments; additional assistance program for projects with HUD-insured and HUD-held mortgages; sample inspections, 60157
Housing assistance payments; existing housing; editorial corrections, 13511
Housing assistance payments; existing housing; eligible elderly, handicapped, and disabled individuals in group residences, etc., 61246
Housing assistance payments; fair market rents; existing housing, 2875, 35163
Housing assistance payments; finance and development agencies; debt service vacancy payments, 33881
Housing assistance payments; new construction; debt service vacancy payments, 33880
Housing assistance payments; new construction; editorial corrections, 13511
Housing assistance payments; Schedule B, existing housing, 13183
Housing assistance payments; substantial rehabilitation; neighborhood strategy areas, special procedures, 4238, 7315
Housing assistance payments; substantial rehabilitation programs; debt service vacancy payments, 33880
Housing assistance program for the disposition of HUD-owned projects; interim rule, 40403
Modernization program--PHA-owned projects, 28790
Personnel policies and compensation, PHA-owned projects; housing manager certification, 50426
Public housing program; development phase; prototype cost limits, 13872, 16168, 26988, 41199, 50423
NEPA responsibilities, applicants lacking legal capacity, 19228
Procurement; small business set-asides, 8139

**PROPOSED RULES**

Community development block grant program; environmental review procedures, 42220
Congressional regulatory review; waiver requests, 57619, 57622, 58592
Contract appeals:
National Housing Act contracts; bid protest procedures, 60392
Environmental criteria and standards; noise abatement and control, etc., 60396
Federal National Mortgage Association, operations; report requirements; examination and audit provisions, etc., 7659, 11589
Low-income housing:
Demolition of structures or disposition of real property, PHA-owned projects, 60301
Energy audits and energy conservation measures; PHA-owned projects, project management-utilities, 60854
Fair market rents; existing housing, 60588
Fair market rents and contract rent automatic annual adjustment factors, 6402, 13758, 46552
Fair market rents and contract rent automatic annual adjustment factors; California, 60583
Fair market rents and contract rent automatic annual adjustment factors; Guam, 6631
Fair market rents and contract rent automatic annual adjustment factors; New Jersey, 6632
Fair market rents and contract rent automatic annual adjustment factors; Oklahoma, 60581, 60583
Fair market rents and contract rent automatic annual adjustment factors; Texas, 60587
Fair market rents and contract rent automatic annual adjustment factors; West Virginia, 12878
Homeownership opportunities; Turnkey III units; standards and procedures, 60830
Housing assistance applications; review procedures, 17448
Housing assistance payments; existing housing; moderate rehabilitation program special procedures, 60752
Housing assistance payments; fair market rents; existing housing, 6402, 46552
Housing assistance payments; new construction; financing, tax exemption obligations, 30498
Housing assistance payments; substantial rehabilitation; financing, tax exemption obligations, 30498
Individual metering utilities; PHA-owned projects, project management utilities, 60856
Tax exemption; obligations of public housing agencies, 30498
Nondiscrimination:
Handicapped in federally-assisted programs and activities, 16652, 25411
Procurement, 25449
Real estate settlement procedures; advance notice, 40539
Relocation payments and assistance and real property acquisition, 13836
Thermal requirements; minimum property standards for one- and two-family dwellings, 17371

**NOTICES**

Advisory committee review; inquiry, 7372
Authority delegations:
Assistant Secretary for Administration et al.; newspaper publication of advertisements, notices, etc., 39440
Atlanta, Acting Area Manager; order of succession, 39858
Atlanta, Acting Regional Administrator; order of succession, 39856
Attesting officers; list, 24144
Birmingham, Acting Area Manager; order of succession, 39858
Boise, Acting Service Office Supervisor; order of succession, 59444
Boston Disaster Field Ofice Director, 25742
Camden Area Office, low<income housing assistance payments program; extension of time, 4461
Chicago, Acting Area Manager; order of succession, 39860
Chicago, Acting Regional Administrator; order of succession, 39862
Cincinnati, Acting Service Office Supervisor; order of succession, 39860
Cleveland, Acting Service Office Supervisor; order of succession, 39861
Columbia, Acting Area Manager; order of succession, 39858
Columbus, Acting Area Manager; order of succession, 39861
Community Planning and Development Assistant Secretary, 11862
Community Planning and Development Assistant Secretary; urban homesteading program, 6166
Coral Gables and Tampa, Acting Service Office Supervisor; order of succession, 39856
Detroit, Acting Area Manager; order of succession, 39861
Federal Disaster Assistance Administration, Administrator, 3627
Federal Housing Commissioner-Assistant Secretary for Housing, 26616
Federal Insurance Administrator; National insurance development program, 7719
Grand Rapids, Acting Insuring Office Director; order of succession, 39861
Greensboro, Acting Area Manager; order of succession, 39859
Indianapolis, Acting Area Manager; order of succession, 39861
Jackson, Acting Area Manager; order of succession, 39859
Jacksonville, Acting Area Manager; order of succession, 39859
Knoxville, Acting Area Manager; order of succession, 39860
Louisville, Acting Area Manager; order of succession, 39860
Memphis, Acting Service Office Supervisor; order of succession, 39857
Milwaukee, Acing Area Manager; order of succession, 39861
Minneapolis-St. Paul, Acting Area Manager; order of succession, 39862
Nashville, Acting Service Office Supervisor; order of succession, 39857
Neighborhoods, Voluntary Associations, and Consumer Protection; Assistant Secretary, 11863
Neighborhoods, Voluntary Associations and Consumer Protection, Assistant Secretary, 4118
Neighborhoods, Voluntary Associations and Consumer Protection; Assistant Secretary; energy efficient performance standards for buildings, 38117
Neighborhoods, Voluntary Associations and Consumer Protection Office; lead based paint poisoning prevention; Assistant Secretary, 42045
Newark, Acting Area Manager; order of succession, 59443
Orlando, Acting Service Office Supervisor; order of succession, 39857
Portland, Acting Area Manager; order of succession, 59444
Procurement and Contracts Office, Director, 39441
Regional Administrators et al.; comprehensive planning assistance program, 39541
Seattle, Acting Area Manager; order of succession, 59444

Spokane, Acting Service Office Supervisor; order of succession, 59444
Committees; establishment, renewals, terminations, etc.:
Federal Equal Housing Opportunity Council, 6664
Mobile Home National Advisory Council, 25941, 53829
Condominiums; consumer forum, 14361
Energy performance standards for new construction, meeting, 8301
Environmental quality, protection and enhancement; procedures, 797, 35170
Improving Government regulations, 22598, 24212, 58639
Low-income housing:
Elderly and handicapped loans; fund allocation, 16652
Neighborhood strategy areas; substantial rehabilitation; FY 1978 special allocation, 8039
Meetings:
Condominiums; consumer forum, 14361
Energy performance standards for new construction, 8301
Housing Costs Task Force, 1654, 3442, 8190, 9538, 16425, 21381
Mobile Home National Advisory Council, 53829
Tenant Participation in Management of Low-Income Public Housing Task Force, 5897, 16552, 39441, 46586
Privacy Act; systems of records, 12760, 12761, 15367, 21947, 22245, 25386, 27247, 27248, 36698, 38473, 51848, 56942
Privacy Act; systems of records; annual publication, 55102
Regulatory agenda; semiannual, 58639

## HUMAN DEVELOPMENT SERVICES OFFICE

### RULES

Child support enforcement program; good cause for refusal to cooperate; program instruction, 15425
Head Start program:
Eligibility requirements and enrollment limitations, 14937
Fee schedule superseded, 2632
Funding of Headstart agencies and designation of replacement grantees, 14935
Grants administration, 14933
Juvenile delinquency prevention programs, activities; CFR Part removed, 51785
Public assistance programs:
Social Security Act disallowances reconsidered, 9266
Sterilizations; Federal financial participation in State claims, 52174
Runaway youth program, 55635
Social services programs:
Abortions; Federal financial participation in State claims, 4581, 4844, 18680, 52174
Standard requirements, State; residential facilities with SSI recipients, 4019
Sterilizations; Federal financial participation in State claims, 52174
Standard setting requirements; medical and nonmedical facilities with SSI recipients, 4019
State plan requirements:
Paternity establishment or support collection, caretaker relatives, good cause for refusal to cooperate, 2180

### PROPOSED RULES

Aging, State and community programs; grants; withdrawn, 53782
Child abuse and neglect prevention and treatment program; advance notice, 39593
Child support enforcement program; good cause for refusal to cooperate; hearing, 15457
Day care requirements; Federal interagency, 17843
Grants, consolidated, to Pacific Islands Territories and Virgin Islands; advance notice, 46871
Handicapped individuals; evaluation standards for State vocational rehabilitation programs; decision to revise, 47218
Public assistance programs:
Grants to States, policies and procedures; recodification decision, 7672
Runaway youth program, 1363, 7600
Social services programs:
Day care requirements, 17843
Disclosure of ownership interests, etc.; individuals and families, 34719
Grants to States; individuals and families, 38326
Work incentive programs for AFDC recipients:
Sanction period determinations; procedures, 53778

### NOTICES

Child welfare services State grants; allotments for 1980 and 1981 FYs, 55822
Committees; establishment, renewals, terminations, etc.:
Model Adoption Legislation and Procedures Advisory Panel, 38747
Developmental disabilities program:
Allotments for 1978 FY, 27244
Grant applications and proposals; closing dates:
Aging Administration dissertation training program, 20057
Aging program, model projects, 16648
Aging research and development projects, 25873
Blindness and severe visual disability rehabilitation research and training center, 32333
Child abuse and neglect grants program, 21728, 21729, 21731, 21733
Child abuse and neglect research and demonstration; FY 1978 proposed priorities; inquiry, 3242
Child abuse and neglect State grants, 32191
Child welfare research and demonstration grants program, 22243, 27490
Child Welfare Services Training Program, 9535
Cooperative research and demonstration projects program, 24472, 26376
Gerontology career training grants, 17057
Head Start programs, 7298
Mental illness rehabilitation research and training center program, 34210
Native American program research projects, 35550, 37224
Rehabilitation engineering and spinal cord injury research, 13099
Rehabilitation long-term training grant program, 3439
Rehabilitation short-term training grant program of national scope, 2760
Rehabilitation short-term training of regional scope, 7370
Runaway youth program, 7606
Services and facilities projects, 3624
Special projects grant program; developmental disabilities, 29834
State capacity building demonstration program, 43564
Vocational rehabilitation special projects and demonstrations; model spinal cord injury system, 15199
Improving Government regulations; inquiry, 23137
Meetings:
Model Adoption Legislation and Procedures Advisory Panel, 45920, 58636
Organization and functions:
Program elements, headquarters staff units, etc., 18613
Social services:
Family median income by State, 3768
Social services; Federal allotment to States:
1979 FY, 28048, 57348
1980 FY, 53060, 59909

## HUNTING

*See Fish and Wildlife Service.*
*National Park Service.*

## IMMIGRATION AND NATURALIZATION SERVICE

### RULES

Immigration regulations:
Alien classification, petitions; relative of U.S. citizens or preference immigrant, 33677
Alien crewmen, nonimmigrant, landing permits and identification cards, 37174, 38811
Alien deportability; Harlingen, Tex.; designation as district office, 22332
Alien deportability; Indochina refugees; status adjustment, 18644
Alien deportability; voluntary departure prior to commencement of hearing, 29528
Alien deportability proceedings, 36238, 48620
Aliens exclusion; filing of applications in exclusion proceedings; clarification, 58363
Aliens exclusion; status adjustment; exclusion proceedings; applications renewal, 16445, 17798
Arrival-departure manifests and lists; Forms I-92 submitted, U.S.-Canada direct flights, 30268, 32741, 60429
Asylum; filing of applications in exclusion proceedings, 40802, 48620, 58363
Contracts with transportation lines, 3995, 38370
Forms; current edition dates, 14957
Forms; immigration; application to accept employment by G-4 aliens, 33231
Forms; Indochina refugees; status adjustment, 18645
Inspection of persons applying for admission; notice to nonimmigrants, 3994
Inspection of persons applying for admission; Spain, conditional entry from, 35260

Nonimmigrant classes; alien physicians (H-1); patient care incidental to teaching and research, 25801
Nonimmigrant classes; application to accept employment by G-4 aliens, 33230
Nonimmigrant classes; designation of Hartford, Conn. and Newark, N. J. as TWOV ports of entry, 23558
Nonimmigrant visitors for pleasure; extension of stay, 12673
Organization; Harlingen, Tex.; designation as district office, 22331, 27168
Permits, reentry; authorization of consular officers to extend, 26696
Ports of entry, preinspection stations, and service offices; opening and closing, 36237
Service forms; distribution, 14303
Service officers, powers and duties; availability of service records; authority to certify records, 16150
Service officers, powers and duties; availability of service records; fee reductions, 5356
Service officers, powers and duties; availability of service records; Harlingen, Tex.; designation as district office, 22332
Service officers, powers and duties; availability of service records; Indochina refugees; status adjustment, 18644
Service officers, powers and duties; availability of service records; responsibilities of service officers in charge, 18161
Service officers, powers and duties; motions to reopen or reconsider, filing fee elimination, 55238
Status adjustment; permanent residence; exclusion proceedings; applications renewal, 16445
Status adjustment; permanent residence; Indochina refugees, 18644
Students, nonimmigrant; admission for duration of status, 54620
Nationality regulations:
Citizenship certificates; children under age 16; procedure further suspended, 13494, 44468
Forms; current edition dates, 14957
Special classes; children adopted by U.S. citizens, 56015
Special classes; children of citizen parents, 56015

**PROPOSED RULES**

Immigration regulations:
Alien deportability proceedings; legal services programs, free; availability, 43721
Aliens exclusion; filing of applications in exclusion proceedings, 58363
Aliens exclusion; legal services programs, free; availability, 43721
Arrival-departure manifests and lists; forms I-92 submitted, U.S.-Canada direct flights, 30268, 60429, 60577
Asylum; filing of applications in exclusion proceedings, 58363
Asylum requests; filing after beginining or completion of deportation proceedings, 40879
Field officers, powers and duties; legal services programs, free; availability, 43721
Inspection of persons applying for admission; legal services programs, free; availability, 43721
Inspection of persons applying for admission; status of aliens paroled into U.S. as refugees, 56050
Legal services programs, free; availability, 43721
Nonimmigrant classes; application to accept employment by G-4 aliens, 11707
Students, nonimmigrant; admission for duration of status; extension of time, 32306, 38414
Nationality regulations:
Citizenship certificates; procedure following denial of application, 26754

**NOTICES**

Medical school graduates, alien; permission to remain in U.S. to take Visa Qualifying Examination, 35405
Meetings:
Immigration and Naturalization Federal Advisory Committee, 16817, 33833, 54704
Nurses, nonimmigrant, out-of-status; voluntary departure, 2776

## IMPORTS AND EXPORTS

*See Agriculture Department.*
*Animal and Plant Health Inspection Service.*
*Commerce Department.*
*Customs Service.*
*Drug Enforcement Administration.*
*Economic Regulatory Administration.*
*Export-Import Bank.*
*Federal Maritime Commission.*
*Foreign-Trade Zones Board.*
*International Trade Commission.*
*Textile Agreements Implementation Committee.*
*Trade Negotiations, Office of Special Representative.*

## INDIAN AFFAIRS BUREAU

**RULES**

Business practices on Navajo, Hopi, and Zuni Reservations; peddler's permit requirements, 27826
Election of officers of Osage Tribe; absentee balloting requirement, 8798
Electric power systems, operation and maintenance charges:
Colorado River, Ariz., 6227, 11983
San Carlos Indian Irrigation Project, Ariz., 32410
Employment preference; definition of Indian, 2394
Enrollment:
Alaska natives, 26442, 29115
Confederated Tribes of Siletz Indians of Oregon, 16175
Preparation of rolls for various tribes; revocations, 19649, 40457
Preparation of rolls from various Chippewa tribes and bands; qualifications and deadlines, 41388
Financial assistance and social services program:
Absolute limits imposed by appropriated funds, 13511
Definitions, 52228
Fiscal and financial affairs:
Alaska Native Fund; recognition of assignments of future interests by regional corporations, 20003
Osage Tribe judgment funds, expenditure for education and socioeconomic programs, 37177, 55759
Fishing on Hoopa Indian Reservation in Northern California, 25278, 30049, 37431, 39086, 46971
Indian lands, extension of trust or restricted status, 58369
Indian self-determination and education assistance programs:
Contracts and grants, procedures, definitions; school construction, etc., 37440
Indian tribe, procedures for acknowledgment of existing American Indian group as, 39362
Irrigation projects; operation and maintenance charges:
Colorado River, Ariz., 60899
Duck Valley Project, Ariz., 29939
Editorial change, 8799
San Carlos, Ariz., 29771
Uintah Indian, Utah, 8799
Law and order on Indian reservations:
Courts of Indian offenses; listing, 49981
Law enforcement standards, civil rights violations, 16973
Menominee Indian Reservation, offenses committee on, 40805
Mining:
Ute Indian Tribe, Utah; management of tribal assets, 40458
Off-reservation treaty fishing
Fraser River convention sockeye and pink salmon fishery, 27187
Identification cards; deadline extension, 4257
Oil and gas mining:
Osage Reservation lands; mineral development contracts, 8135, 11815
Procurement, 37449
Student records maintenance and control in BIA schools, 52024

**PROPOSED RULES**

Adult education programs, 56249
Electric power systems, operation and maintenance charges:
San Carlos Indian Irrigation Project, Ariz., 18213
Enrollment:
Alaska natives, 14684
Confederated Tribes of Siletz Indians of Oregon, 8555
Eastern Creek Indians, 43327
Potawatomi Tribe or Nation, lineal descendant, 35346
Preparation of rolls for various tribes; qualifications and deadline, 19674
Enrollment appeals; filing and processing, 22997
Fiscal and financial affairs:
Alaska Native Fund; recognition of assignments of future interests by regional corporations, 8557
Osage Tribe expenditure of education and socioeconomic funds, 2409
Grazing program for Navajo-Hopi joint use, 36647
Indian self-determination and education assistance programs:
Contracts and grants; procedures, definitions, etc., 12878, 37464

Indian tribe, procedures for acknowledgment of existing American Indian group as, 23743
Irrigation projects; operation and maintenance charges:
Colorado River, Ariz., 51806
Land acquisitions, 32311
Law and order on Indian reservations:
Courts of Indian offenses, 5528
Menominee Indian Reservation, offenses committed on, 25448
Leasing and permitting, 50210
Licensed Indian traders; sale of arms and ammunition, 42767
Off-reservation treaty fishing, 14685
Procurement, 12894
Rights-of-way over Indian lands under jurisdiction of Bureau, 29317
School construction contracts for public schools:
Education Office and BIA joint implementation and funding, etc., 12034

NOTICES

Administrative jurisdiction:
Absentee Wyandotte Allotments, 27904, 52291
Alaska native claims; land allocations; population determinations:
Ohog, Inc., et al., 53062
Alcoholic beverages, introduction, sale and possession; legalizing:
Chemehuevi Indian Reservation, Calif., 20279
Fort Mojave Indian Reservation, 31991
Muckleshoot Indian Reservation, Wash., 26616
Rosebud Indian Reservation, S. Dak., 47291
Seminole Indian Reservation, Fla., 17405
Assets distribution plan, Cher-Ae Heights Indian Community, Trinidad Racheria, Calif.; revoked, 29190
Authority delegations:
Fort Berthold and Fort Totten, Superintendents; land acquisitions, etc., 37764
Phoenix and Billings, Area Directors; power rules, 22452
Sacramento Area Office; Superintendents and Director, Palm Springs Office, 30131
Distribution plans and termination notices:
California rancherias, 42789
Environmental statements; availability, etc.:
Navajo land selection, Ariz. and N. Mex., 36702
Navajo land selection, Ariz. and Utah; hearing, 45480
Vekol Hills Project, Ariz., copper and molybdenum mine, 23021
Irrigation projects, operation and maintenance charges:
Duck Valley, Nev. and Idaho, 29999
Fort Hall, Idaho, 13635, 54998
San Carlos, Ariz., 29839
St. Ignatius, Mont., 19468
Uintah Indian, Utah, 8859
Wapato, Wash., 13636, 56734
Judgment funds; plan for use and distribution:
Colville Reservation and Nez Perce Tribe, 25194
Creek Indians, 34214
Lipan and Mescalero Apache, 22452
Potawatomi Nation, 15789
Taos Pueblo, 22452
Three Affiliated Tribes of Fort Berthold Reservation, 19079
Land transfer:
Absentee Shawnee Tribe of Indians of Oklahoma, 22451
Law and order; court of Indian offenses:
Eastern Band of Cherokee Indians, N.C., 57988
Hoopa Indian Reservation, Calif., 31240
Law enforcement functions performance determinations:
Absentee Shawnee and Cheyenne-Arapaho Tribes, Okla., 20280
Muckleshoot Tribe, 16426
Tule River Indian Tribe, Calif., 57353
Meetings:
Confederated Tribes of Siletz general council, 798
Indian Affairs Bureau Reorganization Task Force, 2453
Meetings; Sunshine Act, 4316, 5645, 8922, 11893
Reorganization Task Force; report availability and inquiry, 16284
Robinson Rancheria, Calif.; return land to trust status, 22789
Siletz Reservation Confederated Tribes; interim council election, 6167
Yurok voting list; voting qualifications, 60670

## INDIAN CLAIMS COMMISSION

NOTICES

Meetings; Sunshine Act, 1172, 1671, 2687, 3670, 6716, 7519, 9550, 13485, 14373, 15405, 16882, 17907, 19104, 20086, 21563, 22296, 23843, 24791, 25771, 26185, 26681, 28084, 29247, 30027, 31101, 32368, 34024, 35431, 36032, 36339, 37536, 38784, 39924, 40995, 42349
Privacy Act; systems of records, 46384

## INDIAN EDUCATION NATIONAL ADVISORY COUNCIL

NOTICES

Meetings, 11874

## INDUSTRY AND TRADE ADMINISTRATION

RULES

Copper set-aside percentages and base period; schedule revision, 24308
Educational and scientific institutions, instruments and apparatus for; nomenclature and technical changes, 7
Export licensing:
Agricultural commodities; exemption from quantitative limitations; short supply controls, 25669
Aircraft on temporary sojourn; GATS, 16713
Bituminous coal and coke; special commodity policies; monitoring reports termination, 16310
Butane; short supply controls, 57142, 58082
Chemical warfare ingredients; commodity control list, 44483
Coal tar, organic; organic medicinal chemicals, etc., 24518
Cobalt and related commodities; short supply controls, 60874
Commodity control list; export of controlled components in end products, 52216
Communist countries, export of commodities to; approval advisory notes, 22343
Crime control and detection commodities; support of human rights, 27985
Documentation requirements; increase in value exemption, 16449
Export clearance; corrections to shipper's export declarations, 43450, 56653
General license GLD, dunnage; deletion, 58553
General license GMS; deletion, 44482, 46962
General licenses; increased value for gift parcels, 10340, 60875
General licenses; return or replacement of certain commodities, 52215
Import certificates and process amendment requests; St. Louis District Office, authority delegation, 49784
Individual validated licenses; application procedures, 47171
Individual validated licenses; requests for extended validity period, 56649
Information to exporters, application review by COCOM; notification request, 12675
Non-agricultural commodities; short supply controls and monitoring, 47172
Nuclear facilities, foreign; review of applications for commodities and technical data, 35027
Nuclear related equipment; transfer of authority to license, 29272
Nuclear weapons programs, commodities supporting; exclusion, 16714
Numerical control systems; information on license applications, 21323
One-cent coins, 43449
Petroleum and petroleum products; short supply controls; West Coast; temporary procedure, 36620
Project, distribution, and service supply licenses; extension, 16447
Republic of South Africa and Namibia restrictions, 7312, 18991, 43450, 60875
Revision of regulations, 58544
Semiconductor diodes and transistors, 43451
Ship stores; correction, 28998
Shotguns, limitation on use of general licenses for, 24517
Shotguns, sporting; commodity control list, 42741
Special commodity policies; export of controlled components in end products, 52215
Special licensing procedures; forms consolidation, 56649
Technical data; editorial amendments, 56650
Technical data; validating license control, 43449, 56031
Tractors, off-highway wheel; commodity control list, 20484
U.S.S.R., Estonia, Latvia, and Lithuania; petroleum equipment and technical data, 33699
Uganda; export trade embargo, 49304
Validated export license shipping tolerances, 16970
Vietnam, shipments of gift parcels to, 44481
Motor-vehicle manufacturer, bona fide; determination:
Nomenclature change, 23991, 60875

Reexports; non-naval reserve petroleum, 58553
Trade practices, restrictive, or boycotts:
Prohibition from compliance by U.S. persons, 3512, 5512, 11576, 16969, 39340
Reporting requirements, 29080
Transfer of DIBA regulations, 7, 8
Watches and watch movements assembled in U.S. insular possessions; codification of quota rules; correction, 753, 2169

PROPOSED RULES
Export licensing:
Agricultural commodities; exemption from quantitative limitations; short supply controls, 3134
Uganda, embargo on exports and reexports, 58571

NOTICES
Coal and coke; export monitoring reports, 1977:
December, 2909, 5022, 5029, 5404
Coal and coke, export monitoring reports, 1978:
January, 7456, 7464, 7680, 9187
February, 10959, 10964, 12736, 12741
March, 13413, 14337, 16208, 17851, 18729
April, 19900
Customs duties and taxes, exemption of foreign air carriers from; request for finding of reciprocity by Nigeria, 32444
Export licensing:
Residual fuel oil from West Coast; hearings and inquiry, 47600
Export Policy Task Force; inquiry, 17523
Export privileges, actions affecting:
Cordin Co., 40259
Eggeling, Franz, et al., 11842
Excel Industries et al., 11841
Hans-Jurgen Filter et al., 4664
LeCoq, Yvon, et al., 31426
Naya, Yoshihiro, et al., 1979
Wintex, Inc., 29596
Improving Government regulations; inquiry, 23180
Japan-U. S. trade; grievance procedures filing, 23627
Meetings:
Computer Peripherals, Components and Related Test Equipment Technical Advisory Committee, 9630, 15471, 20834, 23627, 32157, 32158, 32320, 41071, 49827, 60985
Computer Systems Technical Advisory Committee, 2908, 3418, 3419, 3420, 3602, 7684, 7995, 14346, 15349, 15765, 22430, 22431, 22432, 24347, 24723, 26339, 28847, 28848, 32320, 39407, 41072, 49344, 49345, 49346, 55812, 60329, 60985
East-West Trade Advisory Committee, 9631, 21924, 40901, 57937
Electronic Instrumentation Technical Advisory Committee, 3300, 3925, 9187, 15765, 21029, 28847, 60328
Exporters' Textile Advisory Committee, 783, 9514, 13600, 24347, 32444, 51826, 60327
Importers' Textile Advisory Committee, 9193, 28530, 51699, 58848
Management-Labor Textile Advisory Committee, 3737, 9329, 16533, 22231, 27577, 33797, 43343, 45424, 49345, 59115, 60182
Numerically Controlled Machine Tool Technical Advisory Committee, 1113, 4447, 13087, 29024, 49828
President's Export Council, 19904, 37736, 55811
Semiconductor Technical Advisory Committee, 1114, 1115, 1813, 1814, 1815, 3925, 4876, 9329, 9631, 15470, 16534, 26101, 26339, 26340, 27879, 59536
Telecommunications Equipment Technical Advisory Committee, 2907, 9329, 16363, 29161, 43531, 47234
Meetings; Sunshine Act, 11893, 28895, 56758
Motor vehicle manufacturers, bona fide; list, 24110
Organization and functions:
Administrative and Legislative Policy, Deputy Assistant Secretary, 9184, 36670
Administrative and Legislative Policy, Deputy Assistant Secretary; Public Affairs Office, 51826
Central and field organization, 15791
Domestic Business Development Bureau, 10955
Domestic Business Development Bureau; Iron and Steel Division, 50954
East-West Trade Bureau, Deputy Assistant Secretary, 9182
Export Development Bureau, 38069
Export Development Bureau, Deputy Assistant Secretary, 9177
Field Operations Bureau, Deputy Assistant Secretary, 9180
International Economic Policy and Research Bureau, Deputy Assistant Secretary, 12056
International Economic Policy and Research Bureau; International Economic Research Office, 29344
Trade Regulation Bureau, 13599, 29345, 31426, 56087
Privacy Act; systems of records, 15800
Watches and watch movements; allocation of quotas:
American Samoa, 4274, 5035, 10718, 60313
Guam, 4274, 5035, 10718, 22250, 40048, 42776, 60313
Virgin Islands, 4274, 5035, 16797, 40048, 42776, 60313
*Scientific articles; duty free entry:*
Agriculture Department et al., 10958, 43749, 50720, 59416
Albert Einstein College of Medicine of Yeshiva University/Kennedy Center et al., 14343
Arizona State University, 4080
Auburn University, 32157
Baylor College of Medicine, 40259
Brigham Young University, 6985, 11842, 12900
Brookhaven National Laboratory, 43750, 57631
Carnegie-Mellon University et al., 17521, 18601
Case Western Reserve University, 35367
Charles S. Wilson Memorial Hospital, et al., 29597, 43750
Chemical Industry Institute of Toxicology et al., 15469
Children's Hospital Medical Center et al., 50008
City College of New York Research Foundation, 3411
Clark University, 4081
Cold Spring Harbor Laboratory et al., 40261
Colgate University, 54982
College of Medicine & Dentistry of New Jersey et al., 53485
Colorado State University, 3412, 20527
Columbia University et al., 27878, 28224, 29973, 50719
Connecticut Visual Health Center, Inc., et al., 2745, 11842
Cornell University et al., 35367, 35976, 50720, 57632
Dartmouth College et al., 32846, 36295
Disease Control Center, 2747, 3737
Duke University, 2747, 53487
East Carolina University, 40262
Electric Power Research Institute et al., 25352
Energy Department, 15470
Energy Research and Development Administration, 3412
Food and Drug Administration et al., 40260
Frederick Cancer Research Center et al., 16531, 24108, 24112, 43751
General Food Corp., 35980
Geological Survey, 11843, 15175, 20528, 22431
Geophysical Institute, 3413
Georgetown University et al., 6118
Haskins Laboratories Inc. et al., 45625
Health, Education, and Welfare Department, et al., 20527, 32158, 35368
Idaho State University et al., 34179, 35368, 36503, 53488
Indiana University, 6986
International Fertility Research Program et al., 4664, 45627, 47600
Iowa State University et al., 3414
Jacksonville Children's Museum, 6120
Johns Hopkins University et al., 25353, 32847, 40262, 58216
Lenox Hill Hospital et al., 54982
Long Island University, 3414
Los Angeles County Harbor General Hospital, 54983
Louisiana State University et al., 40263, 58215, 58217
Lovelace Biomedical & Environmental Research Institute Inc., 53488
Massachusetts Institute of Technology, 4665, 15175, 15469, 20528, 28224, 48676, 60323
Medical College of Ohio, 12900
Memorial Hospital et al., 4665
Michael Reese Hospital and Medical Center et al., 58220
Michigan Cancer Foundation, 14344
Mount Sinai School of Medicine et al., 24113, 40264
National Bureau of Standards et al., 28224, 29596, 30326, 40264, 48675, 57632, 60324
National Cancer Institute et al., 35980, 43752, 54983, 57632
National Council of Churches in the U.S.A., 59415
National Eye Institute, 40265
National Institutes of Health et al., 3417, 18599, 24109, 56699, 57634
National Radio Astronomy Observatory, 4081, 4667, 11843, 18599, 22432, 27878, 43752, 57635
National Radio Astronomy Observatory Associated Universities, Inc., 47225, 50721
New Jersey Institute of Technology, 60324

New York University School of Medicine, 6986
North Carolina State University et al., 10953, 20528, 28225, 32849, 53488
Northeastern Ohio Universities College of Medicine, 48676
Northwestern University, 48676, 51826
Northwestern University Medical School, 6987, 9330
Oakland University, 35977
Ohio State University Research Foundation et al., 25354
Oklahoma College of Osteopathic Medicine & Surgery, 14980
Pacific Northwest Laboratories, 48677
Pennsylvania State University, 35977
Presbyterian Hospital et al., 19428, 35978
Princeton Unviersity, 50721
Purdue University, 20529, 40265, 60325
Rensselaer Polytechnic Institute, 32159
Rice University, 15176
Richard B. Russell Agricultural Research Center, 47225
Rome Air Development Center et al., 10423
Rutgers University, 2748, 35978
Salk Institute for Biological Studies et al., 36501, 59415
San Diego State University et al., 45623, 60325
Sandia Laboratories et al., 2748, 6122, 17519, 22433, 25355, 28225, 40265, 57635
Southern California College of Optometry, 59415
SRI International, 36295
St Jude's Children's Research Hospital, 6123
State University of New York et al., 4081, 8576, 22433, 57635
Stevens Institute of Technology, 3418
Texas Woman's University, 35371
Tufts University, 48678, 56701
United Cerebral Palsy of N.Y., 4082
University of Alabama et al., 42288, 45424, 46562
University of Alaska, 6985, 27879
University of Arizona, 35371
University of California et al., 3418, 6123, 6987, 6991, 10954, 11843, 12901, 13419, 14980, 15176, 18600, 20529, 22433, 28226, 29973, 35372, 40266, 40267, 43752, 43753, 47230, 48677, 50721, 50722, 53489, 59416
University of Chicago, 4667, 43754, 50723, 59416, 60325
University of Florida et al., 47232
University of Hawaii, 6988, 16532
University of Illinois at Chicago Circle; withdrawal of application, 58217
University of Illinois et al., 6990, 32159, 32160, 35979, 47229, 50009
University of Illinois Medical Center et al., 21922
University of Kansas et al., 2748, 28226, 35372, 42289
University of Louisville, 6988
University of Maryland et al., 35373
University of Massachusetts, 50723
University of Miami, 18600
University of Michigan et al., 2749, 6124, 14981, 35979, 60326
University of Minnesota et al., 6124, 6988, 15176
University of Nebraska, 2749
University of Nevada, 32161
University of North Carolina, 40268, 43754, 57636
University of Oregon et al., 57636
University of Pennsylvania, 4082, 6642, 15177, 60326
University of Puerto Rico. et al., 50009
University of Rochester et al., 27221, 29597, 40268, 40269, 50723
University of South Alabama et al., 17518
University of Southern California, 6126, 28226
University of Tennessee et al., 25355, 40270, 50724, 56699, 58219
University of Texas et al., 35982, 60327
University of Texas Health Science Center et al., 16532, 18601
University of Texas Medical School et al., 50725
University of Texas System Cancer Center et al., 58217
University of Utah, 53489, 57637, 59417
University of Vermont, 6989
University of Virginia et al., 29597, 53489
University of Virginia Hospital et al., 14345, 15177
University of Washington, 60327
University of Wisconsin, 6989, 47230
Veterans Administration Center Research Service, 35978
Veterans Administration et al., 8171
Veterans Administration Hospital - Iowa City, 20530
Veterans Administration Hospital et al., 40270, 43755
Veterans Administration Hospital Laboratory Service, 14981
Virginia Commonwealth University-Medical College of Virginia et al., 28227
Virginia Institute of Marine Science, 43755
Wagner College, 12901
Washington State Unviersity, 32161
Washington University, 4667, 35980
Washington University School of Medicine, 27880
Wayne State University et al., 40271, 53490
Wesleyan University, 2750
William Marsh Rice University, 53491
Woods Hole Oceanographic Institution et al., 22434, 23750, 35373
Worcester Polytechnic Institute, 4669
Yale University, 6126, 40270

## INSURANCE

*See Farmers Home Administration.*
*Federal Crop Insurance Corporation.*
*Federal Deposit Insurance Corporation.*
*Federal Home Loan Bank Board.*
*Federal Housing Commissioner—Office of Assistant Secretary for Housing.*
*Federal Insurance Administration.*
*Fiscal Service.*
*Social Security Administration.*

## INTER-AMERICAN FOUNDATION

**NOTICES**

Meetings; Sunshine Act, 6196, 38784, 53568

## INTERAGENCY CLASSIFICATION REVIEW COMMITTEE

**RULES**

Security information, National; classification, downgrading, declassification, and safeguarding; Information Security Oversight Office, 46280

## INTERAGENCY COMMITTEE FOR INTERNATIONAL YEAR OF CHILD

*See Child, Interagency Committee for International Year of.*

## INTERAGENCY TASK FORCE ON WORKPLACE SAFETY AND HEALTH

*See Workplace Safety and Health Interagency Task Force.*

## INTERGOVERNMENTAL AND INSTITUTIONAL RELATIONS OFFICE (DOE)

**NOTICES**

Committees; establishment, renewals, terminations, etc.:
Environmental Advisory Committee, 43548
Meetings:
Consumer Affairs Advisory Committee, 44563, 44564
Energy Extension Service National Advisory Board, 52051
National Petroleum Council, 44564
Nuclear Waste Management Task Force Draft Report and Waste Isolation Pilot Plant (WIPP) Project, 13620
Solar Energy Domestic Policy Review, status report; availability, 40909

## INTERIOR DEPARTMENT

*See also Fish and Wildlife Service.*
*Geological Survey.*
*Hearings and Appeals Office, Interior Department.*
*Heritage Conservation and Recreation Service.*
*Indian Affairs Bureau.*
*Land Management Bureau.*
*Mines Bureau.*
*Mining Enforcement and Safety Administration.*
*National Park Service.*
*Reclamation Bureau.*
*Surface Mining Reclamation and Enforcement Office.*

**RULES**

Coal analysis for non-Federal applicants; transfer of functions to Energy Department, 35477, 43459
Conduct standards; annual update, 1072, 29122
Hearings and appeals procedures:
Administrative review proceedings, 37690
Authority to Surface Mining and Reclamation Appeals Board, 17941
Coal mine health and safety discrimination cases procedures, 2724
Indian estates probate, 5514
Surface coal mining, 34386
Improving Government regulations, 58295
Nondiscrimination; sex discrimination, 4259
Procurement, 39377, 39787, 41209, 42751, 43713, 45584, 48640, 50430, 51635, 55404, 59842, 59843
Property management, 761, 11577, 26733, 36933, 42751, 42753, 42756, 48640

Public land orders:
Alaska; emergency withdrawal, 59756
Records and testimony; coal resource data, confidentiality, 15155
Rulemaking, 58295
Trans-Alaska Pipeline Liability Fund, 27840, 33721
Watches and watch movements assembled in U.S. insular possessions; codification of quota rules; correction, 753, 2169
Young Adult Conservation Corps (YACC) program; grants to States for establishment, 12266
Youth Conservation Corps programs; grants to States for establishment, 41005

PROPOSED RULES

Antiquities, American, preservation; definition of object of antiquity, 14975
Departmental proceedings:
Participant expense payment assistance; inquiry, 12339, 16517
Fish and wildlife conservation in water projects; advance notice, 44870
Hearings and appeals procedures:
Surface coal mining, 15441
Improving Government regulations; inquiry, 22573
Property management, 5392, 8272, 42771

NOTICES

Air pollution control; visibility restoration in mandatory Class I Federal areas, 7721
Alaska; energy, fuel, and natural resources transportation; reservation of easements; Secretarial Order revoked, 19726
Alaska; proposed withdrawal of lands, 57134
Alaska emergency withdrawal orders; land descriptions, 59758
Alaska native allotments; occupancy requirement, suspended, 29837
Alaska Native Claims Settlement Act, valid existing rights, 55287, 61023
Alaska Natural Gas Transportation System; supervisory and management responsibilities established, 12095
American Samoa; Attorney General appointment and confirmation; revoked, 29191
Animal Damage Control Policy Study; advisory committee meeting, report availability, and hearings, 16816, 21950
Application procedures for public lands; Nevada, 59555
Authority delegations:
Audit and Investigation Office, Director, et al.; administer oaths and take depositions, 23659
Sacramento Area Office; Superintendents and Director, Palm Springs Office, 30131
Special agents (FWS) et al.; Hoopa Indian Reservation fishing, 32195
Chickasaw National Recreation Area, Okla.; boundary revision, 9659
Coal policy; preference right leasing, 32337
Committees; establishment, renewals, terminations, etc.:
Animal Damage Control Policy Study Advisory Committee, 4124
Cape Cod National Seashore Advisory Commission, 7728
National Park System Advisory Board Council, 47301
Oil Shale Environmental Advisory Panel, 43392
Outer Continental Shelf Advisory Board, 58641
Environmental statements; availability, etc.:
Alaska National Interest Lands, 50050, 54703, 55471
ANG Coal Gasification Co., N. Dak., 3540
Big Bend National Park, Tex., 17407, 35121
Big Sky Mine, Mont., 59138
Big Thicket National Preserve, Tex., 4691
Biscayne National Monument, Fla., 3444, 57355
Bonneville Unit, Central Utah Project, Utah, 34546
Buffalo National River, Ark., 57355
Caballo Mine, Campbell County, Wyo., 46910
Campbell County, Wyo.; coal mining, 38631
Canaan Valley National Wildlife Refuge, W. Va., 13640
Cape Lookout National Seashore, N.C.; general management plan and wilderness study, 38633
Carl Sandburg Home National Historic Site, N.C., 35120
Cerbat/Black Mountain Planning Units, Phoenix District, Ariz., livestock grazing program, 19984, 43392
Challis Grazing Unit, Idaho, 36364
Challis Grazing Unit, range management program, Idaho, 57197
Challis Planning Unit; livestock grazing, 40550, 45480
Coal leasing program, Federal, 33348
Coal management program, Federal, 58778
Coal regional statement; Colorado, 33347, 39441
Coal resources development, Colorado, 57195
Coal resources development, Utah, 49857
Coal resources development, Wyoming, 14747, 25195, 40067, 48084, 50972, 55287, 58641
Coal resources on federal lands; statement of policy and inquiry, 57662
Desolation-Gray River Management Plan, Utah, 47615, 58641
Eastern Powder River Basin, Wyo., 50060
Everglades National Park, Fla., 27251
Federal aid in fish and wildlife restoration programs, 28568, 59913
500 KV transmission line, Ariz. to Calif., 37232
Foothills Project, Colo., 7059
Fort Mojave land, sales, Nev., 36701
Franklin Delano Roosevelt Memorial, West Potomac Park, D.C., 43077
Fryingpan-Arkansas Project, Fountain Valley Conduit, Colo., 48722
Garrison Diversion Unit, N. Dak., 5079, 8041
Gulf Islands National Seashore, Fla. and Miss., 37496
Gulf Islands National Seashore, Fla. and Miss., management and development plans, 19925
Harpers Ferry National Historical Park, W. Va., 43077
Hot Desert grazing management plan, Utah, 21950, 27615, 45480
Josephine Sustained Yield Unit, Oreg., 9540, 14364, 50060
Kealia National Wildlife Refuge, 11869
Liberty State Park, N.J., 11613
Livestock grazing on public lands, 1980 through 1982 FYs, 47298
Mammalian predator damage management for livestock protection in western U.S., 55292
McGee Creek Project, Okla., 17544
Migratory bird disease prevention contingency plan, 53064
Mount Rushmore National Memorial, S. Dak., 50254
Natchez Trace Parkway, Tenn., Ala., and Miss., 27906
Navajo land selection, Ariz. and N. Mex., 36702
Navajo land selection, Ariz. and Utah; hearing, 45480
North Cascades National Park Service Complex; Pacific Crest Trail, rerouting, 40324
North Loup Division, Neb., 43773
North Valmy Coal-Fired Station, Nev., 21060, 50972
Obed Wild and Scenic River, Tenn., 49058
Off-road vehicles on public lands, 17063
O'Neill Unit, Nebr., 26620
Organ Mountain Planning Unit, N. Mex., 30363
Outer Continental Shelf; California oil and gas leasing, 38944
Outer Continental Shelf, Gulf of Mexico; oil and gas leasing, 27250, 42046
Outer Continental Shelf; Mid-Atlantic States; oil and gas leasing, 44893
Owyhee River, Idaho and Oreg.; National Wild and Scenic Rivers System, 23021
Paradox Valley Unit, Colorado River Basin Salinity Control Project, Colo., 21060, 21381
Phosphate leasing; Osceola National Forest, Fla., 35556
Pine Creek State and National Scenic River, Pa., 34546
Pronghorn Mine, Campbell County, Wyo., 30000, 34217
Rio Puerco Resource Area, N. Mex., grazing management program, 21382
Salinas National Monument, N. Mex., 35121
San Luis Valley, Colo., grazing management program, 21382
Sandy Area, Rock Springs District, Wyo., livestock grazing management plan, 21950, 45652
Seven Lakes Area, Wyo., grazing management, 31071
Silver City, Idaho; historic mining town, 56106
Silver City Project, Idaho, 17063
Spring Creek Mine, Big Horn County, 36333
Star Lake-Bisti Region, N. Mex.; coal resource development, 45921, 50971
Tuledad-Home Camp areas, Calif. and Nev., livestock grazing, 20564, 45923
Tuskegee Institute National Historic Site, Ala., 42821
Uncompahgre Basin Resource Area, Colo., grazing management program, 31071
Unitah Unit, Central Utah Project, Utah, 31992, 31993
Upper Gila-San Simon ES Area, Safford District, Ariz., livestock grazing management program, 17874, 45924
Vegetation control using herbicides; Western Oreg., 35397

Vekol Hills Project, Ariz., copper molybdenum mine, 23021
Virgin Islands National Park, V.I., 35121
Voyageurs National Park, Minn., 47301
Yosemite National Park, Calif., 42821, 43569
Youghiogheny State and National Wild and Scenic River, Pa., and Md., 27906, 46588
Floodplain management and wetlands protection; procedures, 25319
Grazing fees, 1978; establishment, 8303
Indian Affairs Bureau Reorganization Task Force; report availability and inquiry, 16284
Lee Metcalf National Wildlife Refuge, Mont.; name change from Ravalli National Wildlife Refuge, 50061
Meetings:
Animal Damage Control Policy Study Advisory Committee, 4887, 16816, 21950, 25742
Indian Affairs Bureau Reorganization Task Force, 799, 2453, 10983
Nonfuel mineral policy review, 31245, 36006
Outer Continental Shelf Advisory Board, 3180, 12953, 33833, 44572, 53511, 54703
Nonfuel minerals, exploration and development on Federal lands; inquiry, 36701
Nonfuel minerals policy review, 31245, 36006
Organization and functions:
Alaska Natural Gas Transportation System, 12095
Heritage Conservation and Recreation Service, 7482
Indian Affairs Bureau Reorganization Task Force; report availability and inquiry, 16284
Outer Continental Shelf oil and gas leasing program, solicitor's opinion, 11614
Outer Continental Shelf oil and gas leasing program, 5-year program; inquiry and development timetable, 50055, 50060, 53510
Privacy Act; systems of records, 10640, 13640, 24748, 35557, 37496, 49579
Privacy Act; systems of records; annual publication, 49480
Public participation in decision-making; interim guidelines; inquiry, 35754
Robinson Rancheria, Calif.; return land to trust status, 22789
Townsite lot sale:
Belle Fourche Project, Newell, S. Dak., 7058
Trans-Alaska Pipeline Liability Fund; notification of oil discharge incidents, 27906
Truckee and Carson River basins, Calif. and Nev.; Newlands, Truckee Storage, and Washoe projects; operating criteria and procedures, 40551
Trust Territory of Pacific Islands:
Interim legislative authority, 49857
Quitclaim and release of rights in various islands, 58123
Watches and watch movements; allocation of quotas:
American Samoa, 4274, 5035, 10718, 60313
Guam, 4274, 5035, 10718, 22250, 24566, 40048, 42776, 60313
Virgin Islands, 4274, 5035, 16797, 24566, 40048, 42776, 60313
Water policy and Federal reserved water rights; inquiry, 53065
Water service and repayment contract negotiations; public participation procedures, 25195
World Heritage List, 1979; nominations, inquiry, 60672

## INTERNAL REVENUE SERVICE

### RULES

Employment taxes:
Combined annual wage reporting, 60159
Deposit requirements; monthly returns due to noncompliance, 56224
State individual income taxes, Federal collection and administration, 59359
Estate and gift taxes:
Annuities, armed forces survivor, 38820
Excise taxes:
Coal; black lung benefits revenue temporary guidelines, 14305
Employee benefit plans; exemptions for services, office space, etc.; correction, 4603
Employee stock ownership plans, 53718
Manufacturers and retailers; special provisions, etc., 13512, 16975
Trucks (light duty) and buses; further manufacture and sale, 41389
Income taxes:
Annuities, armed forces survivor, 38819
Armed Forces members, abatement of income taxes upon death of, 19392
Bank holding companies; elections under the Bank Holding Company Tax Act of 1976, 52027, 54090, 58083
Bank loans; reserves for losses, 3109, 6766
Book-entry security; "other security of the United States," definition, 47505
Carryover basis property, exclusion election; personal and household effects, 35921
Combined annual wage reporting, 60159
Corporate and individual tax returns; automatic extension of time for filing, 45582
Corporations, computation of minimum tax forms, 59356
Corporations, controlled, 2169, 4603, 9475
Credit, general tax; married individuals, etc., 19653
Custodial accounts and annuity contracts, 41204
Debt reserves, bad; thrift institutions, 21454
Disability income payments exclusion, 19655
Disposition of section 306 stock; definition, 34128
Domestic international sales corporations (DISC); filing of returns, etc., 6603
Drilling costs, intangible; election permitted in computing, 17815, 18993
Earned income credit, 13875
Employee retirement benefit plans; annual returns, 29291
Foreign corporations; distributions and foreign base company sales incomes, 32753
Foreign corporations; minimum distribution repeal, 19650
Foreign life insurance companies; percentage revision, 32754
Foreign life insurance companies; percentages for computing tax and estimated tax, 11195
Foreign personal holding company income; Form 958 reinstated, 35279, 36244
Gain from sale or exchange of depreciable property between related taxpayers, 51388
Information returns for carryover basis property, 16734, 36244
Jeopardy and termination assessments, 58816
Minimum tax for tax preferences, 40462
Moving expenses, military, 59355
New jobs credit, 31321, 37451, 60445
Pension plan reserves and annuity contracts, 1065
Political organizations; return requirements; correction, 2721
Property transferred in connection with performance of services, treatment, 31911
Retirement benefits, assignment or alienation, 6942
Retirement plan, multiemployer; definition, 29939
Retirement plans; minimum funding standards; correction, 2721
Return preparers; liability, 54089
Shareholder's interest, distribution in redemption of stock terminating, 10685
State individual income taxes, Federal collection and administration, 59357
Trusts and exempt organizations; information returns upon liquidation, 40221
Procedural rules:
Administrative appeal, single level, 44496
Reorganization of Internal Revenue Service; miscellaneous amendments, 53029, 57874
Returns and claims for refund examination, appellate functions, etc., 17816
Procedure and administration:
Child support obligations, collection, 59376
Domestic international sales corporations (DISC); filing of returns, etc., 6604
Earned income credit, 13875
Employee retirement benefit plans; annual registration, 38003
Employee retirement benefit plans; annual returns, 29291
Foreign corporation information returns; civil penalty abatement for failure to file, 18552
Minimum tax for tax preferences, 40498
Public inspection of rulings, determination letters and technical advice memorandum, 20790
Returns and return information disclosure; Commerce Department, statistical purposes, etc., 14962
Returns and return information disclosure; employee retirement benefit plans, 19657
Returns and return information disclosure; Justice Department attorneys and employees, 29116, 55760
State individual income taxes, Federal collection and administration, 59360
Taxpayer name information disclosure; Census Bureau officers and employees, 60448
Trusts and exempt organizations; information returns upon liquidation, 40222

### PROPOSED RULES

Employment taxes:
Definition of compensation for purposes of Railroad Retirement Tax Act, 39149

Employees of related corporations, 58199
Expenses for household and dependent care services necessary for gainful employment, 39142
Wage reporting, combined annual; information returns, 20020
Estate and gift taxes:
Administration expenses, deductibility; attorneys' fees incurred by beneficiaries, 60965
Annuities, armed forces survivor, 21465
Election procedures, 30070, 43330, 59517
Generation-skipping transfer tax, 59849
Material participation requirements for valuation of farm real property, 31039
Excise taxes:
Black lung benefits, operator's trusts, self-dealing and taxable expenditures, 55799
Private foundations; treatment of imputed interest on contracts, 59518
Real estate investment trusts, 29338, 32150, 37204
Trucks (light duty) and buses; manufacture and sale, 13587
Income taxes:
Alien, nonresident; election to be treated as resident and treatment of community income, 30308
Amortization of railroad rolling stock, 23610
Annuities, armed forces survivor, 21465
Bearer certificates of deposit; information reporting requirements, 10411
Benefit plans (defined) for self-employed individuals and shareholder-employees, 22734, 36977
Black lung benefits, operator's trusts, self dealing and taxable expenditures, 55799
Bonds, arbitrage, 19675, 19678, 39822
Capital losses limitation, 23607
Cemetery companies and crematoria, exemptions, 55798
Cemetery perpetual care funds distribution, treatment, 33936, 43329, 49822
Compensatory payments, amounts deferred under certain nonqualified compensation reduction plans or arrangements, 4638, 5545, 11589
ConRail, stock exchanges under final system plan, 38727, 53045
Construction aid contributions, 22997, 35735
Creditable foreign taxes requirements; inquiry, 38429, 47211
Custodial accounts, regulated investment company stock, 5852
Debt reserves, bad; thrift institutions, 60964, 60965
Deduction limitations; contributions to qualified pension trusts, 21695
Disposition of section 306 stock; definition clarification, 10704
Dividends received deduction of thrift institutions and consolidated returns, 38729
Domestic international sales corporations (DISC) dividends; source of income, 38599
Election procedures, 43330
Employee retirement benefit plans; annual returns, 5854, 12038
Estates and trusts; amortization deductions, 38869
Estates and trusts; pooled income funds; valuation date, 38601
Exempt organizations, option income; tax treatment, 55796
Expenses for houshold and dependent care services necessary for gainful employment, 39142
Farm owners and tenants; definition of net earnings from self employment, 31039
Foreign corporations, controlled; taxation of earnings and profits, 5529, 10939
Foreign corporations; transfers, exchanges, etc.; extension of time, 7245, 18570, 32824, 46859
Foreign corporations in less developed countries; tax credit for domestic corporate shareholders, 60960
Foreign governments, income from commercial activities within U.S., 36111, 51648
Gain from sale or exchange of depreciable property between related taxpayers, 23608
Guarantee agreements; treatment of losses, 41237, 43048
Historic structures, amortization of rehabilitation costs, 38731, 50920
Industrial development bonds; refundings; hearing, 6260
Insurance, group-term life; excludability from employee income, 976, 7448, 12336
Interest related to exempt-interest dividends, 32823
Involuntary conversion of real property, 47753
Itemized deductions and annualization of taxable income, 38725
Jeopardy and termination assessments, 33937
Low-income rental housing; rehabilitation expenditures depreciation of property, 19679, 22059, 31037
Minimum funding standards-asset valuation, 38027
Movie and television films; investment credit for; hearing change, 7448
Moving expenses; mileage test and dollar deductions, 51428
Moving expenses, military personnel, 35949
New jobs credit, 13893
On-the-job training and child care facilities; amortization of expenditures, 38869
Pension, profit sharing, etc.; collectively bargained and multiple employer plans, 38602, 54265
Pension plans; minimum funding standards, asset valuation; hearing, 52734
Pension plans funded by group deferred annuity contracts; amortization of experience gains, 60964
Qualified group legal services plan, application for recognition, 30306
Real estate investment trusts, 29319, 32150, 37204, 54103
Returns, consolidated; tax-exempt organizations, 31038
Returns and return information disclosure; Justice Department attorneys and employees, 29132
Returns by fiduciaries for estates and trusts, 38730
Salary reduction plans; withdrawn, 30308
Stock options, non-qualified; reporting requirements; hearing, 4639
Stock options, qualified; transitional rules, 58830
Substantially disproportionate redemption of stock; withdrawn, 10704
Wage reporting, combined annual; information returns, 20020
Procedural rules:
Administrative appeal, single level, 13896, 13899, 15336
Procedure and administration:
Alien, nonresident; election to be treated as resident and treatment of community income, 30308
Child support obligations, collection, 25143
Employee retirement benefit plans; annual registration, 2892, 6812
Employee retirement benefit plans; annual returns, 5854, 12038
Expenses for household and dependent care services necessary for gainful employment, 39142
Jeopardy and termination assessments, 33939
Minimum exemption from levy, 37717
Transfers of property from U.S.; declaratory judgments, 38605

**NOTICES**

Advisory committees; closed meetings, report availability, 56310
Authority delegations:
Assistant Chief, Collection Division, et al., 29641
Assistant Commissioner (Accounts, Collection and Taxpayer Service) et al.; information disclosure to child support enforcement agencies, 16235
Assistant Commissioner (Employee Plans and Exempt Organizations) and Director, Actuarial Division; waiver of 100% excise tax, 51494
Assistant Commissioner (Inspection) et al.; summonses, oaths, etc., 45663
Assistant Commissioner (Planning and Research), et al., 29643
Assistant Commissioner (Planning and Research) et al.; furnishing special statistical studies, etc., 19314
Assistant Commissioner (Public Affairs) et al.; authorization of first-class air accommodations, etc., 23069
Assistant Commissioner (Public Affairs) et al.; travel expense, 45489
Assistant Commissioner (Resources Management), et al., 29638, 29640, 29647, 29650, 29653
Assistant Commissioner (Resources Management) et al.; oaths and tours of duty, 45490
Assistant Commissioner (Taxpayer Service and Returns Processing) et al., 29644, 29645
Assistant Commissioner (Technical) et al., 29642
Assistant Commissioner (Technical) et al.; closing agreements, 45494
Assistant Commissioner (Technical) et al.; tax liability, 16235
Assistant Commissioners et al., 29640
Assistant Regional Commissioner (Appellate) et al., 25757
Assistant Regional Commissioner (Appellate) et al.; designation of acting supervisory officials, 45488
Assistant Regional Commissioner (Compliance), 30003

Assistant Regional Commissioners (Appellate) et al., 29639, 29642, 29645, 29649
Assistant Regional Commissioners (Examination) et al., 29642, 29648
Associate Chief (Appellate Branch Office); title change, 3211, 4308, 4309, 4310
Chief, Accounting Section, National Office Resources Management Division, 29646, 29647
Chief, Fiscal Management Branch, et al., 29650
Chief Counsel's delegate; settlement of Tax Court cases, 46915
Chief Counsel's delegate; Tax Court cases, 16236
Deputy Commissioner et al., 29644, 29645, 29648
Deputy Commissioner et al., immunity orders, 4702
Deputy Commissioner et al.; information disclosure to Committees of Congress and Comptroller General, 19314
Deputy Commissioner et al.; requests by State tax officials for returns, 54748
Director, Examination Division, 29651, 29653
Director, National Office Resources Management Division, et al., 29639, 29641, 29648
Director, Personnel Division, et al., 29644
Director, Security Standards and Evaluation Division; security clearances, 42328
District Directors; exempt organization determination letters; correction, 51738
District Directors et al., 29651, 29657, 30005, 31257
Facilities Management Division, Director, et al., 2253
Regional Commissioners, 30003, 30004
Regional Commissioners et al.; compromise offers, 16587
Regional Commissioners et al.; disclosure of return information, 16237, 17900
Regional Commissioners et al.; extension of time to taxpayers, 45489
Regional Commissioners et al.; liability determinations, etc., 46916, 52086
Regional Commissioners et al.; taxpayers, identity disclosure to press, 19095
Regional Commissioners (Resources Management) et al., 29641
Regional Director of Appeals; credit or refund claim filing extensions, 46917
Regional Directors of Appeals et al.; agreements, consents, authorizations, etc., 45487, 45490, 45491, 45492, 45493, 45495, 45496, 45497
Safety Management Officer, Space and Property Branch, National Office, 29646
Special Agents and Internal Security Inspectors et al., 29652
Capital construction fund:
Interest rates on nonqualified withdrawals, 59537, 59578
Employee benefit plans:
Prohibitions on transactions; exemption proceedings, applications, hearings, etc., 2029, 2968, 4731, 7746, 15826, 16437, 17067, 17091, 17561, 18354, 18359, 19481, 22799, 22800, 25492, 25513, 28578, 28599, 29391, 30371, 30383, 32196, 32909, 37298, 43593, 45657, 45664, 45666, 45667, 50255, 51880, 52086, 52552, 53874, 55005, 56305, 56306, 56308, 59915, 61061, 61063, 61064, 51889 51890
Excise taxes:
Motor vehicle industries; tax base, 56310
Form 940 (employer's annual Federal unemployment tax return); inquiry, 38150
Form 990 (return of organization exempt from income tax for 1979); inquiry, 50769, 51738
Forms 1040 and 1040A, public hearings and request for forms suggestions, 11884
Meetings:
Art Advisory Panel, 10752, 34569
Commissioner's Advisory Group, 8322, 38658, 39467, 55030
Schools, private tax-exempt; discriminatory policies; inquiry and hearing, 37296, 48091, 50781
Written determinations, public inspection; disclosure intention, 7280, 7281, 13652, 19094, 23069, 26512, 33992, 36746, 52321

## INTERNATIONAL BOUNDARY AND WATER COMMISSION, UNITED STATES AND MEXICO

*See Mexico and United States, International Boundary and Water Commission.*

## INTERNATIONAL BROADCASTING BOARD

### RULES

Meetings; Sunshine Act, 24953, 35619, 47360

## INTERNATIONAL COMMUNICATION AGENCY

### RULES

Agency nomenclature change, 43712
Cultural exchange programs of foreign countries; participation by Federal employees, 42248
Organization, functions, and authority delegations:
USIA and Bureau of Educational and Cultural Affairs, State Department; transfer of functions, 14298, 16312
Privacy Act; implementation, 14457
Procurement, 28493
Security information regulations, 55944

### NOTICES

Culturally significant works of art; determination, 31994
Meetings:
Folk, Jazz and Popular Music Advisory Panel, 49576
Music Advisory Committee, 25196, 49576
Organization, functions, and authority delegations:
Broadcasting, Associate Director; functions, 15368
Contract and Procurement Division, Chief; functions, 15370
Educational and Cultural Affairs, Associate Director; functions, 15369
Management, Associate Director; functions, 15370
Programs, Associate Director; functions, 15368
USIA and Bureau of Educational and Cultural Affairs, State Department; transfer and continuity of functions, 15371
Pompeii exhibit; display in Chicago and Dallas, 36519

## INTERNATIONAL JOINT COMMISSION-UNITED STATES AND CANADA

*See Canada and United States-International Joint Commission.*

## INTERNATIONAL TRADE COMMISSION

### RULES

Conduct standards; Deputy Ethics Counselor; designation, 25671
Unfair import trade practices:
Motions disposition; interpretation, 29275

### PROPOSED RULES

Antidumping Act; interpretive rules and policy statements; inquiry, 2407
Conduct standards; Commissioners et al., 34159
Unfair import trade practices:
Adjudicative procedures, 2883
Enforcement procedures; enforcement, modification, and revocation of final Commission actions, 2883
Enforcement procedures; informal enforcement and consent order, 2883

### NOTICES

Competition conditions study; domestic and foreign steel products, western U.S. market; investigation and hearings, 2244, 4126, 8861, 12130
Customs valuation; adoption of new rules; U.S. economic effect; investigation and hearings, 12096, 12098, 14156, 16555, 20281
Exports to Soviet Union, U.S.; trends, developments and prospects; investigation, 2244
Harmonized commodity description and coding system; draft; inquiry, 5902, 48723
Import investigations:
Alternating pressure pads, 7483, 8304, 29840, 40067, 44572
Apparatus for continuous production of copper rod, 21951, 24749, 31245, 41298, 51454, 52064, 54703
Attache cases, 9379, 31995, 37014
Automatic crankpin grinders, 58642
Automotive and motorcycle repair manuals from United Kingdom, 36335, 40935
Bicycle tires and tubes, 11872, 40067
Bolts, nuts, and large screws of iron or steel, 36145, 37772, 52294
Broomcorn brooms, 4888, 15802
Carbon steel bars and strips from United Kingdom, 3632, 7484
Carbon steel plate from Japan, 4125, 6342, 17410
Cattle whips, 35398, 38949
Centrifugal trash pumps, 6342, 7488, 16553, 29840, 54145
Ceramic articles, 14146
Ceramic tile setters, 5901, 6845, 9379, 21061, 41298, 44573
Cigarette holders, 13104, 23767, 29191, 31995, 35122, 55472

Citizen band (CB) transceivers; report to President, 5592
Clothespins from People's Republic of China, 21952, 24915, 59445
Clothespins from Poland, 34218, 35757, 45653, 59445
Clothespins from Republic of China, 34218, 35757, 45653
Clothespins from Romania, 34218, 35757, 45653, 59445
Color television receivers and related products, 4889
Combination locks, 6169, 6845, 8305, 9541, 11872, 29361, 50973
Compact cyclotrons with a pre-septum, 60674
Display devices for photographs, 2454
Doxycycline, 7273, 8306, 11873, 16429, 18781, 23767, 56286
Electric slow cookers, 5590, 6846, 31994, 37014, 39611, 58232
Fabricated steel plates products from Japan, 41299, 49859
Fish from Canada, 31072, 31995, 46083
Fishing tackle, 14156, 25388, 44573
Flexible foam sandals, 7060, 8305, 15018, 27252, 37014, 39611, 57356
Food slicers, 8305, 30624
Gloves and glove linings from Brazil, 58233, 58873
Gloves from People's Republic of China, 800, 4888
High carbon ferrochromium, 27907, 40555
Ice hockey sticks from Finland, 1655, 13924
Impression fabric of man-made fiber from Japan, 1655, 3319, 14143
Integrated circuits and their use in computers, 59447
Iron or steel bolts, nuts, and large screws, 28057
Leather wearing apparel from Brazil, 58233
Leather wearing apparel from Colombia, 58233
Leather wearing apparel from Uruguay, 5593, 8306, 18343
Luggage products, 2457, 4126, 4693, 6169, 14364, 16428, 18055, 22790, 35399, 40068, 56950
Machine needles, 38949
Methyl alcohol from Canada, 26800, 30366
Molded golf balls, 2019, 3319, 11872, 30001
Monumental wood windows, 5593, 6846, 14365, 16429, 18056, 30001, 31994, 36006
Motorcycles from Japan, 36519, 52295
Multicellular plastic film, 31995
Multicellular plastic film, swimming pool covers, etc., 28258
Nonrubber footwear, 4889
Novelty glasses, 29840, 36519, 43570
Numerically controlled machining centers and components, 5591
Nylon yarn from France, 33833, 49859
Offset paper from Canada, 8306, 12389
Perchloroethylene from Belgium, France, and Italy, 33350, 37772
Photographic color paper from Japan and West Germany, 16554, 20875
Plastic fastener assemblies, 800, 15203, 32468, 33833, 34218, 36519, 44906
Polyvinyl chloride sheet and film from Republic of China, 3319
Portland hydraulic cement from Canada, 29192, 44907
Pump top insulated containers, 52297, 54704
Rayon staple fiber from Belgium, 21740, 35122, 36335, 41299
Rayon staple fiber from Finland, 56735
Rayon staple fiber from France, 56735
Replica black powder firearms, 53065, 60673
Roller units, 6343, 7488, 9541, 18055, 25388, 26496, 50973
Sheet and film polyvinyl chloride from Republic of China, 16429
Silicon metal from Canada, 59555
Skateboards and platforms, 4126, 14365, 17064, 36145, 53511
Sorbates from Japan, 27252, 42313
Stainless steel and alloy tool steel, 4888, 59914
Stainless steel flatware, report to President, 20873
Stainless steel round wire from Japan, 34546, 38949
Standard household incandescent lamps (bulbs) from Hungary, 36336
Standard household incandescent light bulbs from Hungary, 40937
Steel toy vehicles, 4291, 18343
Steel wire nails from Canada, 54304
Steel wire strand for prestressed concrete from India, 24915, 38951
Steel wire strand for prestressed concrete from Japan, 39454, 55826
Sugar from Belgium, 38948, 43392
Sugar from France, 38948, 43392
Sugar from Germany, 38948, 43392
Sugars (cane and beet), sirups, and molasses, 4126
Swivel hooks and mounting brackets, 25743, 29841, 31995
Synthetic gemstones, 11272, 13441, 17063, 18343, 28056, 29362, 31995, 40555, 53841
Tantalum electrolytic fixed capacitors from Japan, 37233
Telephone terminal and switching equipment industry, 2775, 26497, 37497
Telescopic sight mounts, 7059, 8305, 43570
Thermometer sheath packages, 32195, 40068, 46588, 59140
Titanium dioxide from Belgium, 52551
Titanium from France, 52551
Titanium from United Kingdom, 52551
Titanium from West Germany, 52551
Unalloyed unwrought copper, 12130, 14748, 38948
Unalloyed unwrought zinc, 4890, 27908
Unwrought zinc other than zinc alloys, 1015
Welded stainless steel pipe and tube, 8304, 9843
Welded stainless steel pipe and tube from Japan, 19469, 32468
Yarns of wool from Brazil, 58233
Yarns of wool from Uruguay, 58233
Meetings; Sunshine Act, 1671, 2046, 3341, 4539, 4750, 5469, 6354, 6903, 7797, 8346, 9550, 9932, 10789, 12987, 14272, 14795, 15056, 15231, 16882, 17628, 18400, 18628, 19498, 19753, 19754, 20086, 20612, 21106, 22153, 22154, 22806, 24169, 25406, 26362, 26531, 27281, 29055, 29888, 31101, 32220, 32925, 34863, 35160, 36032, 37832, 38992, 39638, 39924, 40102, 40601, 41335, 42349, 43410, 45943, 46418, 46923, 48814, 49604, 49886, 50283, 51197, 51505, 53103, 54175, 55056, 55562, 58144, 59611
Multilateral Trade Negotiations, Geneva; negotiations; effects of implementation, study, 40935
Privacy Act; systems of records, 34218
Privacy Act; systems of records, annual publication, 50802
Tariff Schedules; conversion of specific and compound rates of duty to ad valorem rates; hearings, 14156, 16555, 20281
Watches and watch movements; determination of U.S. consumption and quotas for duty-free entry; Virgin Islands, Guam, and American Samoa, 4890, 14157

## INTERSTATE COMMERCE COMMISSION

### RULES

Accounts, uniform system:
Annual and quarterly reports; rail carriers, 1799, 3126, 28205
Annual reports; motor carriers of property, 46974
Branch line accounting; rail carriers, 1733, 3365, 28498
Prior period adjustments, 37456, 50684
Procedures for adoption of FASB accounting standards, 26313, 50683
Express companies:
Accounts, uniform system; CFR Part deleted, 2726
Schedules and classifications, 8536, 11706, 12327
Forms, list of:
Application procedures; permanent operating authority, grace period for filing, 14317
Broker application, 21678
Freight forwarders:
Claims, overcollection, duplicate payment, and overcharge; processing, etc., 41041
Contracts, freight forwarder-motor carrier; compensation for services, 10923
Freight and passenger tariffs and schedules; embargoes; c.o.d., freight-collect and order-notify services, 972
Practice rules; application procedures, permanent operating authority forms, grace period for filing, 14317
Reports; corporate disclosure, 4618, 15156
Tariffs and classifications, 8547, 11706, 12327
Freight tariffs and schedules, 8531, 11706, 12327
Motor carriers:
Accounts; bus companies, government transfers, 7991, 30559, 36456
Application proceedings; protest standards, 50911, 60277
Applications for certificates and permits, 17828
Claims, over collection, duplicate payment, and overcharge; processing, etc., 41041
Commercial zones, waiver of accounting and reporting requirements, 58376
Dual operations, common and contract carriers; applications, 14664
Embargoes; c.o.d., freight-collect and order-notify services, 972
Emergency temporary authority application proceedings; practice rules, 3711
Exemptions, agricultural cooperative transportation; clarification, 2397, 10697, 21894

For-hire carriers of waste products; substitution of single line for joint-line operations, 59387
Forms, list; service of applications on State officials, 3565, 6789
Freight and passenger tariffs and schedules, 972, 3365, 8538, 8539, 8549, 11706, 12327
Freight and passenger tariffs and schedules; detention of motor vehicles, 30563, 31337
Freight and passenger tariffs and schedules; less-than-truckload (LTL) rates and service; small shipments, 14670, 38408
Freight and passenger tariffs and schedules; service restrictions, 17828, 30566
Household goods transportation; agency relationships, 32303, 39798, 46548, 51805
Household goods transportation; bill of lading, 16340
Household goods transportation; insurance for third-proviso shipments, 762
Household goods transportation; modification of performance report requirements, 3126
Household goods transportation; pack-and-crate operation; Defense Department, 59501
Household goods transportation; reweighing of shipments, 22982, 33921
Less-than-truckload (LTL) rates and service; small shipments, 14670, 38408
Practice rules; application procedures, permanent operating authority forms, grace period for filing, 14317
Practice rules; service of applications on State officials; procedures, 3564, 6789
Property brokers, applications, 3471
Rate bureaus, tariffs and schedules; prohibition of rate modifications, 11201
Temporary authority applications; competitive rate, fare, and charge level standards exception; correction and republication, 1626
Temporary authority applications; tariff and schedule designations, 8554, 11706
Transfers of operating rights; cessation of operations, 38408
Organization, functions, and authority delegations:
Accounting and Valuation Board, 30804
Accounts Bureau, Director, et al., 58189
Commission Chairman et al., 1091, 7438
Review Boards; appellate authority, 57257
Pipeline companies:
Freight and passenger tariffs and schedules; embargoes; c.o.d., freight-collect and order-notify services, 972
Practice rules:
Caption summaries; format change, 2632
Energy policy and conservation, 29946, 36640
Motor carriers; less-than-truckload (LTL) rates and service; small shipments; stay of effective date, 14670, 38408
Price competition among practitioners; advertising use, 59506
Review Boards; discretionary review of final decisions, 57257
Rail carriers:
Abandonment of lines and discontinuance of service, 7623, 10564, 30556, 45588
Accounts; government transfers, 7991, 30559, 36456
Boxcars, incentive per diem charges, 1954
Commuter service continuation subsidies and emergency operating payments, 1715, 3365, 9150, 10369, 37693
Contract rates; policy statement, 58189
Freight and passenger tariffs and schedules; embargoes; c.o.d., freight-collect and order-notify services, 972
Gondolas, incentive per diem charges, 1954, 5835, 8143
Increase proceedings, 1799
Reimbursement for directed service, cost data submission; optional cash funding procedures, 36455
Revenue levels, adequate; standards and procedures for establishment, 5836, 25774, 29296, 57904
Subsidies, rail service continuation standards; conformity with uniform system of accounts, 1692, 3364, 8530, 30065
Subsidies, rail service continuation standards; Northeast-Midwest region; interpretations, 4261
Railroad car service orders:
Ballast cars; substitution, 14475
Boxcars; distribution, 10564, 16739
Boxcars; substitution, 2395, 3125, 9606, 19048, 26735, 29125, 31015, 34476, 51023, 59074
Coal; emergency transportation, 57605
Embargo agents; appointment, 51402
Freight car movement, 3913, 4433, 10561, 16182, 24536, 26312, 35317, 39796, 45864, 56674
Freight cars; demurrage and free time, 14666, 19050, 23723, 24539, 34150, 45866, 56672
Freight cars; distribution, 6951, 14476, 16739, 18555, 21336, 26735, 29125, 37692, 39104, 39794, 51024, 51025, 56673, 60277
Freight cars; ownership, utilization, distribution, etc., 24694
Freight cars; repair and retirement; order to show cause; extension of time, 43719
Gondola cars; substitution of maintenance of way ballast cars, 3710
Grain cars; distribution, 7325, 12327, 14475, 16342, 16979, 19048, 19052, 29008, 56672
Grain elevator explosion, Galveston, Tex.; traffic diverted, 1092
Grain elevator explosion, Westwego, La.; traffic diverted, 971
Grain shipments, multiple-car, 11200, 13063, 13383, 24538
Hopper cars; distribution, 8529, 9281, 10561, 12693, 14967, 19048, 19049, 28497, 29126, 39104, 47730, 49984
Hopper cars; return, 14966, 17361, 29008
Hopper cars; substitution, 23723, 56675
Hopper cars; unit-grain-trains of less than number of cars required by tariffs, 13064, 24696, 34149, 56675
Multiple-car shipments transporting less than minimum quantities, 14473, 21893, 29126, 56674
Refrigerator cars; distribution, 10563, 17360
Refrigerator cars; substitution, 23581
Rerouting agents; appointment, 51404
Trailers, insulated; return, 24538, 25129
Railroad car service orders; various companies:
American Rail Heritage, Ltd., 7325, 36639
Atchison, Topeka & Santa Fe Railway Co., 19396, 39104
Bath & Hammondsport Railroad Co., 4617, 34148
Brandon Corp., 14669, 35718
Brillion & Forest Junction Railroad Co., 22212
Burlington Northern Inc., 8143, 24695, 56671
Chesapeake & Ohio Railway Co., 2725, 14021, 31014, 45868
Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 11823, 43720, 45587, 50184, 59075
Chicago, Rock Island & Pacific Railroad Co., 4432, 19395, 26581, 26736, 34147, 45866, 45869
Chicago & North Western Transportation Co., 5834, 7325, 7623, 9282, 14668, 24539, 28497, 39795, 39796, 45586, 51024, 55410, 56671, 56673
Consolidated Rail Corp. et al., 3710, 6789, 8528, 10922, 13063, 28496
Erie Western Railway Co., 2396, 3282, 27841, 31014
Goodwin Railroad, Inc., 7324, 36639
Hillsdale County Railway Co., Inc., 55409
Illinois Terminal Railroad Co., 35317, 46851, 56902
Indiana Interstate Railway Co., Inc., 1093, 29007
Kansas City Southern Railway Co., 4432, 34148, 39795
Lamoille Valley Railroad Co., 972
Lenawee County Railroad Co., Inc., 16341, 34150, 45866, 59383
Louisiana & Arkansas Railway Co., 7324, 36639
Louisville & Nashville Railroad Co. et al., 762, 44536
Madison Railroad, 54098
Madison Railway, 42258, 47976
Mercersburg Railway, 51403
Michigan Interstate Railway Co., 4432, 34149
Missouri Pacific Railroad Co., 14476, 26446, 45587, 59074
Missouri-Kansas-Texas Railroad Co., 40021
Norfolk & Western Railway Co. et al., 20235, 24695, 51023
North Stratford Railroad Corp., 19047, 50907, 56673
Octoraro Railway, Inc., 26311, 59074
Providence & Worcester Co., 4433, 34147
Richmond, Fredericksburg & Potomac Railroad Co., 15426, 38407
South Central Tennessee Railroad Co., 29127
St Louis-San Francisco Railway Co., 14474, 19050
Union Pacific Railroad, 15156
Western Maryland Railway Co., 41403
Reports:
Annual, corporate disclosure, 4618, 15156
Annual; motor and rail carriers; government transfers, accounting procedures, 30561
Annual; rail carriers; class I and II companies, 35485
Annual; rail carriers; class III designation, 28205, 50684
Annual; rail carriers; class III form, 60473
Annual, special, or periodic; companies; CFR section deleted, 2726
Annual and quarterly; rail carriers; classes of carriers; effective date stayed, 1799, 3126
Motor carriers; CFR correction, 46974

Piggyback traffic statistics; reporting requirements, 46852
Rail carriers; separation of expenses between freight and passenger service, 7637
Rail carriers; track maintenance, 21894
Tariffs and schedules:
Filing requirements for government shipments at reduced rates, 59844
Section 5a applications; rate proposal notification following prior independent action, 55252
Water carriers:
Freight and passenger tariffs and schedules, 972, 3365, 8544, 11706, 12327
Practice rules; application procedures; permanent operating authority forms, grace period for filing, 14317

PROPOSED RULES

Accounts, uniform system:
Abridged procedures for adoption of new accounting standards, 1370, 10711
Rail carriers; branch line accounting system report, 51052
Rail carriers; Class III classification, 3140
Rail carriers; track structures alternative methods, 50717
Railroad transportation property definition, 34172
Conduct standards, 20208
Freedom of information; business information disclosure, advance notice, 57625
Freight forwarders:
Exemptions; aircraft transportation; property transportation incidental to, 8817, 31182, 34172, 38609
Freight tariffs and schedules; additional charges, 39157
Improving Government regulations, 27732
Motor carriers:
Application procedures, protest standards, 17008
C.O.D. shipments, handling of funds, 32314
Commercial zones; expansion of Washington, D.C., into Loudon County, Va., 56922
Exemption, single-State, ex-water traffic, 30587
Exemptions; aircraft transportation; property transportation incidental to, 8817, 31182, 34172, 38609
For hire motor carriers, competitive contracting procedures; transportation of Government traffic, 32314, 46053
For-hire operating authority; issuance to private carrier applicants, 33945
Freight and passenger tariffs and schedules, 15168
Freight tariffs and schedules; additional charges, 39157, 57930
Freight tariffs and schedules; classification system investigation, 14978
Household goods, pack-and-crate operation; Defense Department, 17509
Household goods transportation; agency relationships, 13078
Household goods transportation; estimating practices investigation, 18712, 28217
Household goods transportation; participation in credit card systems, 17004
Household goods transportation; reweighing of shipments, 14324
Irregular route property carriers; gateways and tacking, applications, 18581
Lease and interchange of vehicles, 1109, 29812
Liability provisions, checked baggage, 44558
Mobile homes transportation, 41242
Operating rights application proceedings; rate evidence guidelines, 7675, 43478
Shippers; extension of credit; conference, 39404, 41059
Practice rules:
Commuter service continuation subsidies and emergency operating payments, 49825
Price competition among practitioners; advertising use, 5857, 13404
Procedures governing informal rulemaking proceedings; improving Government regulations, 27732
Rail general increase proceedings, procedures, 57309
Small shipments tariff; released rates, 15168
Rail carriers:
Abandonment of lines and discontinuance of service; applications, 15754, 22751, 41245
Abandonment of lines and discontinuance of service; publicizing applications, 33775
Appellate procedures, 17006
Boxcars and gondolas, incentive per diem funds, use of, 17985
Capital incentive rate proposals, 22062
Cost standards for railroad rates, variable and incremental, 46877, 58206
Exemption authority, general, 24718, 58305
Intercity passenger service, adequacy for handicapped, 25152, 28216, 31364, 35082, 36642
Shippers; extension of credit; conference, 39404, 41059
Terminal performance standards for non-perishable commodities, 33774, 38736, 39157, 44869
Railroad car service orders:
Automatic car identification systems; petition requested, 43744
Freight cars; repair and retirement, 40891
Railroad car service orders; various companies:
Atlanta & West Point Railroad Co. et al., 35082
Railroad consolidation procedures; applications for mergers, controls leases, etc., 15753
Reports:
Certification reporting requirements, class I carriers; inquiry, 14528
Motor carriers; quarterly report form (QFR), 57626
Rail carriers; annual forms, 1376
Rail carriers; class II and III companies, 3140
Rail carriers; classes of carriers, class III designation, 3140
Rail carriers; track maintenance, 3731, 3920
Sunshine Act; implementation, 15752
Tariffs and schedules; collective ratemaking agreements under section 5a, terms and conditions for approval, 1809

NOTICES

Agreements under sections 5a and b, applications for approval, etc.:
Bulk Carrier Conference, Inc., 15212
Central & Southern Motor Carriers, 24767
Central States Motor Freight Bureau, Inc., 30642
Middlewest Motor Freight Bureau, 11887
Motor Carriers Traffic Association, Inc., 26530
National Bus Traffic Association, Inc., 11887
National Motor Freight Classification, 26646
Pacific Inland Tariff Bureau, 27949
Pacific Motor Tariff Bureau, Inc., 26530
Reopening of section 5a application proceedings, 1666, 4154, 18827
San Francisco Mover Tariff Bureau, 50784
Southern Motor Carriers Rate Conference, Inc., 19329
Western Railroads, 11654
Committees; establishment, renewals, terminations, etc.:
Employee Board on Education and Practice et al., 50784
Confidentiality of financial data; policy statement, 58001
Decisions; format standardization, 16240, 30182
Docket prefixes; proceedings on microfilm, 15403
Financial interests statement:
Martin, James E., 44604
Fourth section applications for relief, 814, 1025, 1579, 1871, 2471, 2473, 2971, 3985, 4312, 4733, 5466, 6193, 6866, 7391, 7498, 7794, 8217, 8901, 9404, 9915, 10664, 11653, 11887, 12419, 13123, 13458, 13655, 16241, 17441, 18390, 18813, 19096, 19493, 20073, 20295, 21775, 21966, 22482, 23674, 23799, 24642, 25401, 26178, 27633, 27634, 27948, 29394, 30636, 30970, 31294, 32207, 32527, 34009, 34570, 35153, 35421, 37054, 37321, 38662, 40334, 40972, 41454, 42329, 45507, 46618, 47633, 48798, 49090, 50108, 50531, 50783, 51496, 52323, 52823, 53547, 54159, 54748, 56311, 56750, 56972, 57403, 57468, 58003, 58004, 58141, 58244, 59224, 59241, 60166
Hearing assignments, 57, 811, 1024, 1418, 1419, 1578, 1659, 1870, 2041, 2472, 2683, 2786, 2969, 3236, 3327, 3640, 3787, 3788, 3985, 4153, 4535, 4894, 5128, 5450, 5606, 5912, 6193, 6351, 6669, 6865, 6951, 7285, 7498, 7754, 8051, 8215, 8323, 8654, 8900, 9213, 9403, 9547, 9723, 9914, 10458, 10665, 10752, 11003, 11639, 11640, 11782, 11886, 12164, 12419, 12810, 12984, 13121, 13458, 13654, 13655, 13937, 14198, 14595, 14596, 14790, 14978, 15212, 15382, 15547, 15828, 16239, 16438, 16588, 16872, 17093, 17441, 17623, 17903, 18080, 18389, 18623, 18827, 19096, 19314, 19492, 19747, 19957, 20072, 20593, 20887, 21088, 21403, 21526, 21775, 21965, 22142, 22294, 22481, 22803, 23071, 23673, 23798, 24158, 24397, 24642, 24947, 25216, 25401, 25516, 25758, 25895, 26178, 26355, 26512, 26627, 26817, 27273, 27632, 27948, 28068, 28321, 28602, 28886, 29047, 29205, 29392, 29657, 29878, 30006, 30178, 30383, 30636, 30959, 31079, 31294, 31494, 32094, 32206, 32344, 32527, 32916, 33363, 33871, 34009, 34236, 34569, 35573, 35778, 36026, 36027, 36156, 36549, 36748, 37053, 37508, 37818, 38155, 38661, 38757, 38986, 39207, 39626, 40333, 40971, 41324, 41453, 42095, 42847, 43082, 43596, 43792, 44953, 45507, 45668, 45933, 46139, 46617, 46917, 47044, 47633, 49088, 49393, 50277, 50782, 51193, 51495, 51892, 52569, 52570, 53088, 53876, 54158, 54348, 55833, 56123, 56311, 56747, 56972, 57210, 57402, 57715, 58001, 58244, 58468, 58469, 58693, 58883, 58884, 59224, 59454, 59608, 59946, 59947, 60692

Improving Government regulations; inquiry, 27729
Inflation policy statement, 41325
Interstate Commerce Act codification; availability and transitional procedures, 49409
Meetings:
Intercorporate hauling regulation evaluation, 60692
Meetings; Sunshine Act, 1432, 1885, 3239, 3341, 4539, 5645, 6903, 7797, 8922, 10469, 11037, 12813, 13162, 13966, 14796, 15836, 17113, 18128, 19330, 20612, 21408, 21792, 24169, 24404, 24405, 25226, 25936, 26880, 28612, 30391, 32220, 32368, 34266, 34575, 35619, 35620, 38505, 38992, 39215, 41335, 41466, 44612, 47359, 49108, 51505, 56153, 56758, 57718
Motor carrier, broker, and water carriers; revocation proceedings, 51892
Motor carrier, broker, water carrier, and freight forwarder applications, 3641, 3642, 4501, 6868, 7499, 7754, 8630, 9676, 9686, 11005, 11011, 12143, 13459, 14563, 14595, 14793, 15513, 16844, 16879, 19102, 19317, 21528, 20297, 20315, 21539, 22491, 23831, 23841, 23840, 24945, 25901, 26526, 26846, 27638, 27953, 28292, 28320, 28885, 29206, 31302, 31501, 32494, 33371, 34258, 35586, 36748, 37054, 38756, 38985, 40971, 41157, 41453, 46415, 50531, 55540
Motor carriers:
Canadian traffic; operating authority; applications policy, 60706
Cash letters, 28602
Cash letters interpretation, definition; filing time extended, 33364
Cement, emergency shortage; supplemental transportation, 35780
Charter operations utilizing school buses; Barker's School Bus Service, Inc., 56747
Commodities service classification, aggregated; interpretation, 32346
Contract carrier applications; policy statement regarding "rule of eight"; inquiry, 38756
Crete Carrier Corp.; conversion proceeding appeal, 46404
Dual operations, 28321
Emergency transportation services; temporary authority application procedures, 3328, 58701
Emergency transportation services; temporary authority applications; revised list of officials, 47344
Entry and acquisition protection; policy statement, 56978
Exemptions; agricultural cooperative transportation, filing notices, 38755, 42095, 47043, 50783, 52088, 55833
Finance applications, complaints, and ex parte proceedings; dockets microfilmed, 27632
Finance proceedings; certificate preparation, 20609
Finance proceedings; dormancy and burden of proof, 40098
Freight charges and cargo claims; setoffs; administrative ruling, 11003
Household goods transportation; informal conference, 50531
Intercorporate hauling regulations, 58002, 60692
Irregular route property carriers; gateway elimination, 1660, 2987, 4479, 4733, 5450, 6669, 8323, 9724, 9742, 10762, 11003, 12419, 13124, 15027, 16589, 16611, 19096, 20594, 21775, 22491, 23799, 24767, 24778, 26512, 26513, 26627, 26817, 28068, 29394, 30009, 31080, 31258, 32348, 34009, 35421, 37057, 37508, 38758, 40334, 40972, 42096, 42329, 43794, 46142, 48767, 48780, 50110, 50115, 50981, 52323, 52823, 54748, 56124, 57403, 58244, 59225
Lease and interchange of vehicles, 11783, 12165, 18390, 19101, 19102, 26817, 27272, 30971, 31079, 34572, 35429, 35780, 36027, 37054, 39627, 39885, 40097, 40596, 49600, 50108
Meat packing industry; emergency temporary authority, 42096
Microfilming docket files; permanent operating authority applications, 3789
Operating rights applications; policy statement, 55051
Operating rights applications; rates consideration; policy statement, 42097
Owner operator cost and impact on rate structure; inquiry, 6867
Passenger fares, intercity commuter bus fare increase, N.Y. and N.J., 6194
Permanent authority applications, 5608, 15538, 19315, 20293, 24646, 25401, 25902, 25935, 26836, 27938, 28282, 29237, 30158, 30960, 31494, 32209, 33364, 33371, 33861, 33872, 35142, 35421, 35608, 36185, 36557, 37301, 37311, 37792, 38756, 38966, 39469, 39885, 39894, 40584, 41128, 41139, 41156, 41324, 41332, 41453, 42057, 42060, 42070, 42329, 43597, 43792, 44586, 45500, 45668, 46109, 46118, 46415, 46624, 46918, 47043, 47044, 47633, 48755, 49085, 49876, 50068, 50080, 50093, 50784, 50785, 51167, 51496, 52341, 52798, 52811, 53535, 55030, 55513, 55526, 56124, 56981, 57373, 57385, 58129, 58438, 58452, 58468, 58701, 58702, 59197, 59212, 59584, 59596, 60692
Pickup and delivery; investigation, 20608
Property broker special licensing; applications, 58, 1665, 2811, 3789, 6194, 7392, 8223, 10465, 10752, 11653, 13964, 17109, 19493, 21560, 25768, 32527, 34571, 35156, 36029, 37054, 38156, 42097, 46920, 47074, 50109, 55054, 58009
Rates and charges; investigation, 16873, 16874, 16875, 16876, 16877
Tariff rate increase; Middle Atlantic Conference, 15549
Tariff rate increase; Southern Motor Carriers Rate Conference, Inc., 15500
Temporary authority applications, 18823, 19495, 19747, 19957, 1419, 2257, 2261, 2787, 2971, 2980, 3329, 4740, 4896, 4901, 4905, 6687, 6691, 6695, 6700, 6704, 6712, 7285, 8217, 8901, 8905, 8907, 8913, 9915, 9919, 9923, 10459, 10665, 10669, 10674, 10753, 10757, 11641, 11645, 11649, 11652, 12165, 12170, 12175, 13137, 13141, 13145, 13148, 13152, 13156, 13940, 13944, 13947, 13950, 13953, 13956, 13961, 14200, 14203, 15027, 15383, 15387, 15391, 15395, 15399, 15828, 16242, 16633, 17093, 17099, 17104, 17440, 17441, 17903, 18390, 18819, 18813, 19962, 19966, 19973, 19979, 20073, 20887, 20890, 21089, 21094, 21099, 21540, 21561, 21966, 22142, 22482, 22485, 23071, 23076, 23798, 24158, 24398, 24642, 24646, 24762, 24766, 25217, 25527, 25762, 25896, 26179, 26182, 26357, 26526, 26642, 26832, 26846, 27274, 27278, 27634, 27638, 27949, 28077, 28322, 28325, 28601, 28603, 28606, 28886, 28890, 29047, 29051, 29230, 29233, 29878, 29881, 30006, 30179, 30384, 30638, 30971, 30975, 31091, 31095, 31294, 31298, 31494, 31497, 31501, 32011, 32012, 32016, 32020, 32520, 32523, 33364, 33368, 34023, 34238, 34242, 34862, 35153, 35575, 35579, 35582, 35780, 35785, 36029, 36337, 36549, 36553, 36642, 36748, 36750, 36753, 37054, 37322, 37325, 37329, 37508, 37527, 37531, 37818, 37822, 37825, 37828, 38662, 38773, 38776, 38966, 38986, 39207, 39208, 39905, 39908, 40981, 40984, 41149, 41153, 41157, 41325, 41329, 41454, 41458, 41463, 43405, 43607, 43610, 43614, 43805, 43808, 44606, 44955, 44959, 45501, 45504, 45679, 45683, 45934, 45938, 46408, 46411, 46618, 47056, 47063, 47344, 47350, 47357, 47635, 47642, 48091, 48799, 48805, 49090, 49097, 49394, 49401, 49876, 50093, 50278, 51893, 52089, 52327, 52328, 52335, 52573, 52579, 52586, 52587, 52594, 52828, 52836, 53548, 53553, 53877, 53882, 54159, 54164, 54173, 54334, 54341, 54347, 54758, 54767, 55539, 55540, 55550, 55834, 56311, 56316, 56322, 56328, 56973, 57417, 58004, 58248, 58468, 58693, 58701, 58702, 58885, 59948, 59957, 60707, 61069, 61075
Temporary authority applications; caption summary drafting policy statement, 21561
Temporary authority applications; filing procedures during work stoppages, 45686, 46920
Temporary authority terminations, 11654, 11888, 11889, 17110, 17111, 17440, 17441, 20080, 21403, 32014, 34023, 35157
Transfer proceedings, 19749, 19750, 1025, 1427, 1429, 1871, 2256, 2789, 3237, 3985, 3986, 4535, 4895, 5608, 6193, 6700, 6866, 7290, 7794, 8055, 8656, 9757, 10462, 10464, 11004, 11652, 12179, 12434, 12435, 12810, 12811, 13458, 13939, 13964, 15052, 15548, 15549, 16241, 16878, 17625, 17626, 17903, 18080, 18624, 19316, 19493, 20887, 20889, 21539, 21540, 21546, 21965, 22148, 22803, 22804, 23080, 23673, 23674, 24165, 24666, 24767, 24945, 25401, 25768, 25895, 26355, 26356, 27273, 27278, 27279, 28325, 28326, 30387, 30388, 30636, 30638, 32024, 32919, 32922, 34570, 34571, 36027, 36337, 37055, 38500, 38986, 38987, 39467, 40346, 40597, 41461, 41463, 42848, 43406, 45508, 46140, 46622, 46920, 47357, 47634, 47810, 48798, 49407, 49408, 50108, 50278, 50783, 51194, 51195, 52843, 52845, 53547, 53890, 53891, 54172, 54774, 55540, 55555, 56333, 56751, 57417, 58009, 58010, 58469, 58470, 58884, 59947, 60365

Transport statistics, financial and operating; publication of regional groupings discontinued, 7081
Operating authority applications, special orders, 3237, 3650
Organization, functions, and authority delegations:
Commission issuances; internal operation and procedures, 57211
Permanent authority matters and rulemakings; expanded use of Federal Register; policy statement, 21527
Petitions, applications, finance matters (including temporary authorities), railroad abandonments, alternate route deviations, and intrastate applications, 1026, 1418, 1872, 2790, 3650, 4515, 5129, 5627, 6194, 6868, 6879, 7766, 8610, 9404, 9697, 9723, 11022, 12151, 13464, 14574, 14595, 14793, 15522, 16855, 16879, 18082, 18094, 18813, 20337, 21546, 21560, 22490, 22496, 22504, 23831, 23840, 24934, 25223, 25913, 25934, 26859, 28303, 28321, 29215, 29245, 30167, 31266, 31501, 32503, 33872, 34023, 34246, 35586, 36566, 37801, 38976, 39207, 39913, 40987, 41157, 41332, 42838, 44595, 46127, 47069, 48787, 50093, 51178, 51497, 52352, 53558, 55041, 56139, 57397, 58462, 58702, 59578
Petitions filing:
American Bus Association, 13654, 15827
Archer Daniels Midland Co., 4312
Automatic car identification systems, 25935, 37301
Blue Bird Coach Lines, Inc., et al., 20295, 23798
Carolina Cartage Co., Inc., 30178
Clark Transfer, Inc., et al., 35574
Clipper Express Co., 58140
Consolidated Rail Corp. et al., 7498
Corrugated Carriers, Inc., 24398
Declaratory orders; railroads, 17903, 22292, 41324
Defense Department, 19494
Denver & Rio Grande Western Railroad Co., 55831
Florida East Coast Railway Co., 32527
Grand Trunk Western Railroad Co. et al., 7391, 7498
Graves Truck Line, Inc., 9758, 12143
Grocery Manufacturers of America, Inc., et al., 30970
Noble Graham Transport, Inc., 5129
Norfolk & Western Railway Co., 6867
Pinto Trucking Service, Inc., 49601, 55308
Ryder Truck Lines, Inc., 8655, 10752
Sea Land Service, Inc., 51496
Trailways, Inc., 37329, 40972, 42850, 60366
Port equalization study; hearings, 32012
Practice rules; disbarment proceedings:
Weir, Thomas A., 17110
Privacy Act; systems of records; annual publication, 50804
Rail carriers:
Accounts, uniform system; exemption, 815
Cancellation of leases over filing of complaints; investigation, 25934
Disaster application for reduced rates; Island Mountain, Calif., tunnel fire, 42345, 46140, 49883, 57219
Drought areas, North Carolina; carriers transporting hay at reduced rates, 3328
Exemption authority; fresh fruit and vegetables, 58304
Exemption authority, general, 58305
Grain shipments; requests for reduction of cars, 10678
Merger applications, filing procedures, 15828
Microfilming docket files; train abandonment applications, 3789
Perishable protective tariffs, schedules; inquiry, 40097
Revenue levels adequacy; levels, 1978 proceeding, 25778
Winter storms, disruption or temporary suspension of rail operations; informal conference, 50531
Railroad car service orders:
Boxcars; distribution, 18080
Freight car movement, 30384, 39883, 45934
Freight cars; operating regulations, 42847, 46403, 46404
Grain cars; distribution, 17623, 18813
Grain cars; inspection and billing, 22294
Hopper cars, covered; distribution; petition denied, 14792
Hopper cars, covered; phosphate and fertilizer shipment, 27637
Hopper cars, covered; replacement, 24947
Railroad car service orders; various companies:
Apache Railway Co. et al., 20071
Atchison, Topeka & Santa Fe Railway Co., 20593, 27948, 50981, 60706
Atlanta & West Point Rail Road Co. et al., 38990, 44606
Burlington Northern, Inc., 31294, 32918, 42848, 46402, 60365
CP Rail et al., 38663
Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 19748, 46403, 55557, 57211
Chicago, Rock Island & Pacific Railroad Co., 21403, 42847, 45500
Chicago & Northwestern Transportation Co., 17442, 42847
Consolidated Rail Corp., 35152, 39627
Denver & Rio Grande Western Railroad Co., 38986, 40596
Illinois Central Gulf Railroad Co., 15547, 19749, 20594, 27949
Maryland & Pennsylvania Railroad Co., 55557, 57219
Missouri Pacific Railroad Co., 45500, 57219
Missouri-Kansas-Texas Railroad Co., 20608
Soo Line Railroad Co., 20080
Southern Pacific Transportation Co., 29885, 32345, 58141, 60366
St. Louis Southwestern Railway Co. et al., 52356, 53091, 55557, 56752
Union Pacific Railroad Co., 27637
Virginia & Maryland Railroad, 21406
Railroad car service rules, mandatory; exemptions, 2041, 2684, 3470, 3641, 4732, 6351, 6352, 7370, 7391, 7795, 8051, 8656, 8900, 9404, 9548, 9724, 9758, 10665, 10753, 13122, 13938, 14198, 14199, 14791, 15212, 15382, 15548, 16240, 16439, 17109, 17442, 17623, 17624, 18080, 19747, 19748, 20594, 20610, 20890, 21527, 22481, 24403, 24952, 25223, 25895, 28321, 29656, 29657, 30183, 30184, 32917, 35151, 35152, 35779, 38155, 40333, 40334, 42848, 46403, 46407, 46622, 50108, 50115, 52328, 53087, 53893, 58141
Railroad contract rates; policy statement, 22148
Railroad freight rates and charges; various States, etc.:
Arkansas, 57210
Colorado, 18624, 57402
Georgia; intrastate demurrage rules, 27948
Idaho, 16588, 61082
Iowa, coal to; capital incentive rate, 4312
Kansas, 13123, 46918
Mississippi, 28601
Montana, 56750
Nationwide, 20295, 25759, 33871, 40596, 42836, 49085, 52570, 56334
Nebraska, 54774
North Carolina, 9548
Oklahoma, 22489
Texas, 22804
Texas, coal to; capital incentive rate, 24398
West Virginia, 11655
Western coal movements, 22151
Wyoming, coal from; capital incentive rate, 4312
Railroad operation, acquisition, construction, etc.:
Adirondack Railway Corp., 36026, 37053
Atchison, Topeka & Santa Fe Railway Co., 29656, 38156, 55556
Burlington Northern, Inc., 3788, 3789, 36337, 61081
Chicago, Madison & Northern Railway Co., 1579
Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 2970, 38159, 38160, 38161, 55556, 56124, 57715
Chicago, Rock Island & Pacific Railroad Co., 815, 38158, 38159
Chicago & North Western Transportation Co., 18625, 23071, 26645, 38157, 53089
Goodwin Railroad, Inc., 9214
Grand Trunk Western Railroad Co. et al., 25759
Illinois Central Gulf Railroad Co., 19749, 38161
Illinois Terminal Railroad Co., 48798, 49408
Indiana Interstate Railway Co., Inc., 1660
Itel Corp., 17905
Lenawee County Railroad Co., Inc., 17905
Minneapolis, Northfield & Southern Railway, Inc., 46919
Missouri Pacific Railroad Co. et al., 2789
National Railway Utilization Corporation, 28326, 43406
Newrail Co., Inc., 14369
Norfolk & Western Railroad Co. et al., 2256, 51893
Norfolk & Western Railway Co. et al., 49883
Octoraro Railway, Inc., 815
Oregon-Washington Railroad & Navigation Co. et al., 23082
Richmond Railroad Co., 50783
Seaboard Coast Line Industries et al., 59966
Seaboard Coast Line Railroad Co. et al., 9216
Soo Line Railroad Co., 38162, 38163
South Branch Valley Rail Road, 30642
Southern Pacific Transportation Co. et al., 38164, 44606, 55835
Southern Railway Co. et al., 25217, 32207, 49601
Western Maryland Railway Co. et al., 32208
Willamina & Grand Ronde Railroad Co., 46140
Railroad services abandonment:
Allegheny & Western Railway Co. et al., 17904
Atchison, Topeka & Santa Fe Railway Co., 22149, 42057, 44604

Baltimore & Annapolis Railroad Co., 1023, 5127
Baltimore & Ohio Railroad Co., 9213, 14790, 24946, 26817, 36749, 43793
Burlington Northern, Inc., 11886, 20072, 20292, 27633, 49492, 59224
Central Iowa Transportation Cooperative, 27637
Chesapeake & Ohio Railway Co. et al., 1024, 4731, 8052, 34237, 43794, 53891
Chessie System, 22264, 29659
Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 4154, 4895, 5607, 6352, 9547, 9548, 10677, 13938, 17563, 22150, 23799, 27633, 36156, 44605, 51749, 53892, 54315, 55834, 57220
Chicago, Rock Island & Pacific Railroad Co., 30980, 39212
Chicago & Eastern Illinois Railroad Co., 30960, 34237
Chicago & North Western Transportation Co. et al., 814, 2969, 11887, 18389, 22281, 32345, 44954, 49882, 53891, 53892
Chicago Produce Terminal Co., 20593
Chicago South Shore & South Bend Railroad Co., 811
Consolidated Rail Corp., 14214, 32012, 42060
Delaware & Hudson Railway Co., 22287, 32345
Denver & Rio Grande Western Railroad Co., 56334
Detroit, Toledo & Ironton Railroad Co., 25516
Duluth, Winnipeg & Pacific Railway Co., 32014
Escanaba & Lake Superior Railroad Co., 29659
Fairmont, Morgantown & Pittsburgh Railroad Co. et al., 13122
Fort Worth & Denver Railway Co., 44605
Georgia Southern & Florida Railway Co., 20073
Grand Trunk Western Railroad Co. et al., 11296, 47634
Hoboken Shore Railroad, 30970
Illinois Central Gulf Railroad Co., 814, 1579, 2786, 5128, 5608, 7499, 13655, 14791, 15212, 17904, 30182, 34237, 36749, 46918, 51748, 55834
Illinois Central Railroad Co., 12985
Illinois Terminal Railroad Co., 25518, 49512
Kansas City Southern Lines, 14256
Lake Superior & Ishpeming Railroad Co., 12985
Los Angeles & Salt Lake Railroad Co., 17587, 37321, 57220
Louisville & Nashville Railroad Co., 1025, 2971, 6711, 8052, 14261
Maine Central Railroad Co., 8217, 46919
Marinette, Tomahawk & Western Railroad Co., 9214
Missouri Pacific Railroad Co., 21088, 25521, 59240
Missouri-Kansas-Texas Railroad Co., 6352, 8052, 44955, 49508
Montour Railroad Co., 17590
Montpelier & Barre Railroad Co., 49511
Mount Hood Railway, 17592
Norfolk & Western Railway Co. et al., 11296, 42078, 49882
Northampton & Bath Railroad Co., 16247
Northwestern Pacific Railroad Co., 14210
Oregon Electric Railway Co., 20079, 20608
Oregon Short Line Railroad Co., 19948, 44605
Oregon-Washington Railroad & Navigation Co. et al., 2255, 17594, 29661, 37329
Petaluma & Santa Rosa Railroad Co., 17597, 21089
Pittsburgh, Chartiers & Youghiogheny Railway Co., 17599
Pittsburgh & Lake Erie Railroad Co., 22290
Quanah, Acme & Pacific Railway Co., 7291
Raritan River Rail Road Co., 8222, 29657
San Diego & Arizona Eastern Railway Co., 8055, 17601
Seaboard Coast Line Railroad Co., 9216, 9561, 58010
Soo Line Railroad Co., 30183, 36179
Southern Pacific Transportation Co., 8055, 8919, 10464, 12179, 14792, 17603, 18394, 22150, 23082, 32012, 51748
Southern Railway Co. et al., 1429, 14246, 19952, 25527, 39885
Spokane, Portland & Seattle Railway Co., 27637
Spokane International Railroad, 18811
St. Joseph & Grand Island Railroad Co., 18809
St. Louis Southwestern Railway Co., 16249
St. Louis-San Francisco Railway Co., 1580, 3790, 15230, 42089
Texas & Pacific Railway Co., 23083, 49884
Texas South-Eastern Railroad, 59240
Union Pacific Railroad Co., 17618, 30183
Valley & Siletz Railroad Co., 32344
Virginia & Southwestern Railway Co. et al., 39213
Wabash Railroad Co. et al., 30980, 43811
Warren & Ouachita Valley Railway Co., 44955
Washington County Railroad Co. et al., 22150
Wellsville, Addison & Galeton Railroad Corp., 22151, 51749
Western Pacific Railroad Co., 3006
Wheeling & Lake Erie Railway Co., 57220
Winston-Salem Southbound Railway Co., 3988, 11890
Yakima Valley Transportation Co., 17621
Railroad services abandonment; procedures for pending cases, 20072
Rerouting of traffic:
All railroads; work stoppage delay, 46407
Alton & Southern Railway Co. et al., 46401, 47044
Association of American Railroads, 46624, 53088
Atchison, Topeka & Santa Fe Railway Co. et al., 24397, 46402, 58140
Baltimore & Ohio Railroad Co. et al., 5606, 9724, 40347, 53038
Birmingham Southern Railroad et al., 19984
CP Rail et al., 30641, 32918, 32919, 35153, 35430, 36756, 38663, 40347, 42850, 46403, 46621
Carolina, Clinchfield & Ohio Railway Co., 40597
Chesapeake & Ohio Railway Co., 57, 4313, 8216, 32918, 35152, 35778, 36756, 37330, 38989, 40348, 42850, 46404, 46621, 50981, 53089
Chesapeake Western Railway, 40597
Chessie System, 6711
Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 58, 3987, 4732, 6710, 7392, 8216, 9404, 10677, 15548, 17623, 19748
Chicago, Rock Island & Pacific Railroad Co., 20594, 22294
Chicago & North Western Transportation Co., 6710, 7392, 9404, 13964, 24946, 25934, 28603, 35421
Consolidated Rail Corp. et al., 3988, 29655
Fort Worth & Denver Railway Co., 36757, 46406, 50969, 53090
Grand Trunk Western Railroad Co., 4313, 6710, 53090, 57219
Illinois Central Gulf Railroad Co., 53893
Middletown & Hummelstown Railroad Co., 4895, 35430, 53091
Missouri Pacific Railroad Co., 1026
New York, Susquehanna & Western Railroad Co., 35430, 53894
Norfolk & Western Railway Co., 10464
San Diego & Arizona Eastern Railway Co., 14792, 46408, 53091
Southern Pacific Transportation Co., 14210, 29655, 38989, 40347, 53092
St. Louis Southwestern Railway Co., 17442, 26836, 50110
Straits Ferry Car Service Corp., 2684
Susquehanna & Western Railroad Co., 4912
Western Maryland Railroad Co., 20609
Western Maryland Railway Co., 2042, 15548, 24947, 46408, 53092
Self-insurance authority; Willett Motor Coach Co., 9915
Waste product transportation for reuse or recycling, 6711, 9549, 11889, 12810, 18394, 20608, 24167, 28603, 31080, 35574, 35575, 36029, 58141, 58142, 59240
Water carriers:
Grain commodities, bulk, in bargeloads; interim report, 15382
Knappton Towboat Co.; application, 5912
Water and water-related transportation; legislative recommendations; inquiry, 59608
Wisconsin Barge Line, Inc.; operating authority; correction, 51497

## INTERSTATE LAND SALES REGISTRATION OFFICE

### RULES

Field Review Office, establishment and authority delegation, 6580
Formal procedures and practice rules, 29496

### PROPOSED RULES

Advertising, sales practices, posting of notices of suspension:
Advertising disclaimers, property reports, etc., 23936, 29804
Land registration, 23936, 29804

### NOTICES

Land developers; investigatory hearings, orders of suspension, etc.:
Arrowhead, 12758
Aspen Run, 17872
Beaver Creek, 12758
Boiling Spring Lakes, 40063
Brookridge Community, 3947, 3948
Cobb's Glen, 15788
Deer Run Estates and Deer Run Estates No. 2, 15788
Driftwood Estates, 30359
Forrester's Retreat, 3948
Miami Acres West, 15789
Quail Hollow Pines et al., 19924

Rancho McCrea, 12759
South Houghton Lake Forest Estates, 14133
Sunland, 17872
Sunnylake Ranch, 12759
Tanglewood Lake, 12760
Waterwood, 24144

## INVESTMENTS

*See Overseas Private Investment Corporation.*
*Securities and Exchange Commission.*

## JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

*See Actuaries, Joint Board for Enrollment.*

## JUSTICE DEPARTMENT

*See also Antitrust Division.*
*Drug Enforcement Administration.*
*Federal Bureau of Investigation.*
*Federal Prison Industries.*
*Immigration and Naturalization Service.*
*Law Enforcement Assistance Administration.*
*National Institute of Corrections.*
*Parole Board.*
*Parole Commission.*
*Prisons Bureau.*

**RULES**

Conduct standards:
Compensation for speeches or writings, suggestion of payment of fee to charities; prohibition, 52702
Criminal justice information systems:
Information exchange, 50173
Employee selection procedures; uniform guidelines, 38311
Hospital and medical care, recovery of cost; settlement and waiver of claims, 1066
Information; production or disclosure:
Associate Attorney General; authority delegation, 45992
Information exchange, 50173
Privacy Act; Parole Commission systems of records; exemptions, 45993
Sunshine Act, implemenation; Parole Commission meetings, 4978
U.S. Marshals Service, Director; authority delegations, 19849
Organization, functions, and authority delegations:
Administration, Assistant Attorney General; audiovisual activities, 55395
Antitrust Division, Assistant Attorney General; energy policy and conservation, 8256
Assistant Attorneys General; increased settlement authority, 20793
Associate Attorney General; attorney personnel matters, 1066
Associate Attorney General et al.; establishment of major functions within Offices, Boards, Divisions, or Bureaus, 54929
Branch Directors et al.; Civil Division cases, 38820
Civil Rights Division; Deputy Assistant Attorney General; FOI requests, 37686
Criminal Division; seizure and forfeiture of materials under Copyrights Act, 6228
Criminal Division, United States Attorneys et al., ; civil penalties compromise, etc., 50677
Customs Litigation Field Office, Attorney-in-Charge; service in customs litigation, 43296
Deputy Attorney General et al.; supervisory functions, 26001
Executive Office for U.S. Attorneys, Director; personnel authority, 14009
Federal Bureau of Investigation, Director; claims settlement, 57249
Federal Bureau of Investigation, Director; collection and exchange of identification records with law enforcement and other agencies, 8137
Information exchange, 50173
Information Law and Policy Office, establishment, 45992
Land and Natural Resources Division; assignment of responsibility under the Surface Mining Control and Reclamation Act, 55394
Land and Natural Resources Division, Assistant Attorney General, et al.; litigation involving EPA, 3115
Land and Natural Resources Division et al.; litigation initiation and settlement, 36069
Management and Finance Office; disposition of unclaimed property, 43296
Personnel and administrative matters; per diem and travel allowances, 22969
Tax Division, settlement of civil claims, 36438
U.S. Attorneys, rights of redemption; release, 36438
U. S. Marshals Service, Director; appropriations for prisoners in custody, 20006
Policy statements:
Ex parte communications in informal rulemaking proceedings, 43297
Information exchange, 50174
Information Law and Policy Office; establishment, 45992
Privacy Act; implementation, 19883, 36439, 38386, 45993, 49535
Property management, 3279
Witness fees; disposition of unclaimed property, 43296

**PROPOSED RULES**

Employee selection procedures; uniform guidelines, 1506, 9131, 11812, 14955
Information; production or disclosure:
Privacy Act; FBI Investigative Support Information System; records system exemption, 51816
Privacy Act; implementation, 19883, 21901, 22999, 43330
Privacy Act; implementation, 19883, 21901, 22999, 35347, 36486, 43330, 51816

**NOTICES**

Authority delegations:
Legal Counsel Office, Assistant Attorney General, 22791
Federal Election Campaign Act and Internal Revenue Code, statutory responsibility guide; memorandum of understanding with FEC, 5441
Freedom of information index; availability, 10447
Improving Government regulations; inquiry, 22922
Meetings:
Circuit Judge Nominating Commission, U.S., 22087, 30903, 35123, 35758, 43570, 55473, 56735, 57356, 58434, 59914, 60242, 60674, 60675
Federal Judicial Officers, U.S. Selection Committee, 8196
Newspaper operating agreement; Cincinnati Enquirer and Cincinnati Post, 8596, 23767
Pollution control; consent judgments; U.S. versus listed companies, etc.:
Beaunit II et al., 4127
C F & I Steel Corp., 23659
Caribbean Gulf Refining Corp., 32196
Cleveland Electric Illuminating Co., 40069
Connecticut Department of Transportation et al., 57356
Consolidated Packaging Corp., 23659
Gulf Oil Co., 2457
Heywood Wakefield Co., 4127
Homestake Mining Co., 4127
Hudson Pulp & Paper Co., 20282
International Minerals & Chemical Corp. et al., 12763
Lynn, Mass., city of, 50062
Memphis, city of, 1846
Public Service Co. of New Mexico et al., 18345
Puerto Rico Aqueduct and Sewer Authority, 9660
Simplot, J. R., Co., 9379
St. Petersburg Beach, Fla., city of, 57197
Trap Rock Industries, Inc., 32196
Witco Chemical Corp., 25746
Privacy Act; systems of records, 7060, 18059, 18060, 19926, 21953, 25883, 30138, 31443, 33350, 33351, 35403, 36149, 36520, 38120, 38474, 51861, 53067, 56287, 57357, 57990
Privacy Act; systems of records; annual publication, 44676
Voting rights; appointment of examiners:
Bullock County, Ala., 51728
Burke County, Ga., 51861
Crockett County, Tex., 35758
Darlington County, S.C., 51728
El Paso County, Tex., 51728
Marion County, S.C., 27617
Pickens County, Ala., 39193
Reeves County, Tex., 19470
Russell County, Ala., 43396

## LABOR DEPARTMENT

*See also Benefits Review Board, Labor Department.*
*Employment and Training Administration.*
*Employment Standards Administration.*
*Federal Contract Compliance Programs Office.*
*Labor Management Relations Office.*
*Labor Management Services Administration.*
*Labor Statistics Bureau.*
*Manpower Administration.*
*Mine Safety and Health Administration.*
*Occupational Safety and Health Administration.*
*Pension and Welfare Benefit Programs Office.*
*Wage and Hour Division.*

**RULES**

Apprenticeship and training, equal employment opportunity, 20760
Comprehensive Employment and Training Act:
Compilation of regulations; correction, 16974
Retirement programs; prime sponsors and eligible applicants, extension of time for compliance, 34462

Wage rates; maximum and supplemented, eligibility, and fraud and abuse provisions; transitional regulations for all CETA programs, 61130
Youth, economically disadvantaged; summer program for, 21859
Youth incentive entitlement pilot projects; corrections, editorial changes, etc., 23504
Youth programs, 14940, 43657
Youth programs; employability of Indians and native Americans, 47937
Youth programs; migrant and seasonal farmworker families, 2151
Contracts:
Construction, federally financed and assisted; labor standards; nursing home care for veterans and overtime; correction, 2394
Davis-Bacon and related Acts; statutes list, 32130
Federal service; labor standards; changes in minimum rates, 1491
Walsh-Healey Public Contracts Act; procedures, 22975
Farm labor contractor registration:
Certificates of registration for housing, 44839
Mine safety and health; civil penalties for violations, 23517
Privacy Act; implementation, 36070
Procurement, 29782
Procurement, preference in; companies in high unemployment areas; CFR Parts revoked, 19393
Senior community service employment program:
Eligibility increase, 28468
Poverty criteria, 33708
Wage rates, predetermination procedure:
Davis-Bacon and related Acts; statutes list, 32130
Davis-Bacon Information System, 1943

**PROPOSED RULES**

Comprehensive Employment and Training Act:
Youth, economically disadvantaged; summer program for, 14424
Youth programs; clarification of provisions, 29098
Employee selection procedures; uniform guidelines; hearing and meeting, 9131, 11812, 14955
Grants and agreements to State and local Governments, Indian and native American entities, etc.; administrative requirements, 26042
Intergovernmental Personnel Act Programs:
Personnel administration merit system; standards, 20996
Mine safety and health; civil penalties for violations, 9120
Mining; filing and other administrative requirements:
Hazardous conditions complaints; processing procedures, 9113
Legal identity notification, 9109
Representative of miners, 9108
Safety standards, mandatory, petitions for modification; practice rules, 9114
Privacy Act; implementation, 25145
Procurement, 21014
Work incentive programs for AFDC recipients:
Sanction period determinations; procedures, 53771

**NOTICES**

Authority delegations:
Employment Standards, Deputy Assistant Secretary, et al.; procurement responsibilities, 51469
Labor-Management Relations Assistant Secretary; information from IRS, 23036
Labor-management relations program, 38136
Mine Safety and Health Assistant Secretary et al., mine safety and health programs administration and enforcement, 13648
Committees; establishment, renewals, terminations, etc.:
Internal Labor-Management Relations Committee, 38136
Consumer price index, all items; U.S. city average, 8862
Consumer representation plan; annual meeting requirement; elimination, 29848
Improving Government regulations; inquiry, 22915, 24212
Industry study reports for adjustment assistance eligibility:
Bicycle tires and tubes, 46590
Bolts, nuts, and large screws of iron or steel, 2458, 61038
Citizens Band (CB) radio transceivers, 12966
Fishing tackle, 52563
High-carbon ferrochromium, 2458, 46590
Stainless steel flatware, 25494
Unalloyed unwrought copper, 43589
Unalloyed unwrought zinc, 31460
Meetings:
Metal and Nonmetallic Mine Health and Safety Standards Review Advisory Committee, 7071, 11278
Mine Health and Safety Training Program Regulations Review Advisory Committee, 9885
Minimum Wage Study Commission, 21748
Women's National Advisory Committee, 33836
Organization, functions, and authority delegations:
Special Investigation Office; establishment, 27261
Women's Bureau, Director; coordination and direction of women's programs, 11767
Privacy Act; systems of records, 25206, 28579, 29042
Privacy Act; systems of records; annual publication, 42106
Tax credit reductions, Federal unemployment; deferral, 59165
Unemployment compensation:
New Hampshire Department of Employment Security; hearing, 26500, 36721
State laws, certification, 51473
Virgin Islands, approval, 2957
*Adjustment assistance:*
A & A Manufacturing et al., 15205, 40071
A & F Leathers, Inc., et al., 7068, 32886
A. F. Saar Inc., 7729
A.F.T. Motor Freight, Inc., 17550
AMA Fishing Corp. et al., 33840, 57674
AMF, Inc., et al., 35130, 47795, 50258
A.M. Milwaukee Body Employees Credit Union et al., 28579, 46592
A. O. Smith Corp., 8209, 49062
A.O. Wilson Structural Co., 8207, 29846
ARA Food Services Co., 27915
ARP Instruments, Inc., 9381
A. Rivetz Co., Inc., 17070
ASARCO Inc., 9387, 9390, 9391, 18791, 24633, 27915, 38140, 41306, 41307, 43573, 44935, 47796, 50760, 51475, 53854, 56295, 57675
A.S. Mines, Inc., et al., 8864, 26148
AVTEX Fibers, Inc., et al., 50758
A-T-O Inc., 49067
Abarry Steel Co., 26147
Aberdeen Sportswear Co. et al., 50269, 59927, 61039
Ace Knitting Mills et al., 21069, 36704
Ace Sportswear Co., 9873
Acme Hamilton Manufacturing Corp. et al., 27925, 50257
Acme Leather Sportswear et al., 57692
Adriana Coat Co., 51866
Advent Corp., 21077
Aeroquip Corp. et al., 25498, 61046
Aetna Pipe Products Co. et al., 1555, 11278
Aetna Standard Engineering Co. et al., 7069, 28587
Aiken Industries, Inc., 14752, 27914
Aileen, Inc., et al., 15205, 56292
Airco, Inc., et al., 26499, 39455, 44917
Airco Industrial Gases et al., 18790
Al Tech Specialty Steel Corp. et al., 3777, 37235
Alabama By-Products Corp., 18782
Alabama Casual Co., Inc., 57673
Alan Wood Steel Co. et al., 2952, 9380, 14164
Alatex, Inc., et al., 26497, 38634, 50751, 50759
Albarry Steel Co. of Camden et al., 12400
Albe Manufacturing Corp., 9874
Alberto et al., 11277, 38125
Albex Contractors, Inc., et al., 8865, 29846
Aldon's Inc. et al., 56953
Aliquippa & Southern Railroad Co., 17070
All Seasons, Inc., et al., 22793, 36715
All Star, Inc., 51867
Allegheny-Ludlum Steel Corp. et al., 17550, 18360, 35759
Allegro Fashions et al., 32885, 55014
Allen Shoe Co., Inc., et al., 7743, 24621
Alliance Weaving, 12393
Allied Leather Co., 14753, 25493
Allis-Chalmers Corp. et al., 60243
Allivine Knitting Mills, Inc., et al., 55012
Allstate Lawn Products, Inc., 55476
Alpha Handbag Corp. et al., 17551, 33836
Alpo Coat, Inc., 50257
Alps Coat, Inc., 50258
Alstate Lawn Products et al., 24634
Alta Products Corp., 29366, 37234
Alton Box Board Co., 22088
Altoona Shoe, Inc., et al., 10648, 14773, 38125
Altschul, Julius, Inc., 34562, 47799
Aluminum Co. of America et al., 39193, 49584
Alvin Coat, Inc., 40564
Alvin J. Eckhart Co., 34551
Amax Specialty Metals Corp. et al., 21068, 57674
Ambassador Clothes, Inc., 30922, 36716
Amberton Knitting Mills, Inc., et al., 1557, 36716
American Biltrite, Inc., 21079, 30922, 43573, 56293
American Bosch, 14165
American Brush Co., Inc., 22089
American Color & Chemical Corp., 7729
American Crystal Sugar Co. et al., 12967, 31461

American Girl Coat Co., Inc., 56294
American Motors Corp. et al., 1548, 2459, 27923, 29366, 30922, 30923, 31461, 31462, 35125, 59179
American Pillow Co., Inc., et al., 50270, 55476
American Stay Co., Inc., et al., 27924, 46592
Ameron, Inc., 17071, 34551
Ameron Steel & Wire Producing Division et al., 7070
Ametek, Inc., 4151
Amigo Smokeless Coal Co. et al., 49060
Amity, Browne-Tilt, Inc., 28584
Amityville Broadway Production, Inc., 31462
Ampco-Pittsburgh Corp., 31463
Anaconda Co. et al., 1554, 5085, 11278, 26147, 30923, 30924, 32887, 51471
Anamax Mining Co., 7730
Anchor Motor Freight, Inc., 36716, 37235
Ancur Textile Printing Corp., 49584
Andave Sportswear, Inc., 18782
Anderson Development Corp., 23027
Andrew Pallack & Co., Inc., 14776
Andrew Worsted Mills, Inc., et al., 29365, 47796
Andrex Industries Corp. et al., 30928, 55477, 57675
Angie Clothing Co., Inc., 44918
Angle Iron & Steel Corp. et al., 39194
Ann Dave Sportswear Co. et al., 7065
Annetta of California, Inc., 35125
Anthony Sportswear, 22089
Anthracite Overall Manufacturing Co., Inc., et al., 3778, 30925
Anthracite Shirt Co., 21070
Antonello Fashions, Inc., 52553
Anwelt Corp., 5086
A'Paree, Inc., et al., 3776, 34551
Apeco Corp. et al., 10650, 24150, 31464, 50758
Apex Distributing Co. et al., 28581, 51472
Apex Glove Co. et al., 7744, 14773, 41306
Apex Leather Manufacturing Co. et al., 46591, 58643
Aquada Products, Inc., et al., 14774, 47325
Arjan, Inc., 52553
Armando Dal Molin Music Typographers, 28586
Armco Steel Corp. et al., 10649, 22089, 22099, 24622, 26147, 30925, 33836, 38642, 44918, 44919
Armor-San Francisco Galvanizing, Inc., et al., 7066, 18783
Aronica Sportswear Inc., 56294
Aronson Textile Co. et al., 40576, 56954
Arrow Clothes, Inc., et al., 32887
Arrow Co. et al., 5087, 5088, 5089, 5090, 5091, 5092, 5093, 18782, 39193, 53853, 53854
Artex Industries, Inc., 44920
Arthur Winer, Inc., 50259
Arthur Winer & Co., 18783
Arvin Outerwear, Inc., 36717
Aspen Skiwear et al., 52564
Atlantic Highlands Manufacturing Co., 44920
Atlantic Tubing & Rubber Co., 1141
Atlas Tack Corp. et al., 56951
Atrax Cemented Carbide, 46593
Auto Village, Inc., et al., 22087, 51472
Avante Fashions, 36717
Avondale Mills et al., 39458, 51864, 61040
Avtex Fibers, Inc., 22090
B & B Coat, 34552
B-W Footwear Co., Inc., 57676
Bags by Trudy, 35760
Baker Nail Co., 9381
Baldt, Inc., et al., 55013
Ballet Makers, Inc., 29367
Baltimore & Ohio Railroad Co., 18783
Baltimore Type & Composition Corp., 7731
Bamberger Reinthal Co., 4130
Bancroft Cap Co., 45654
Baran Abraham Hat Corp., 59166
Baran-Abrahman Hat Co., Inc., et al., 32885
Baro Corp., 4129, 44921
Baron Fashions, Inc., 46593
Barringer Knitting Mills, Inc., et al., 46593, 59165
Bauer Canadian Skate, Inc., 14753
Baxter Stores, Inc., 25494
Beaumont Co., 39455
Bedford Cloak & Suit, 52553
Beiersdorf, Inc., 40071, 40072
Beisinger Industries Corp., 4131
Bel Air Fashion, Inc., 33837
Bel Sportswear, Inc., 21070
Belk Manufacturing Co., Inc., 14754
Bell & Howell Communications Co., 32888
Belrose Knitting Mills, 38635, 61040
Bendix Corp., 61040
Benmax Sportswear Co., 26148
Bennett Manufacturing Co., 41308
Bentley Knitwear Corp., 43574
Bentonville Manufacturing Co., 58643
Bernardi Fashions, Inc., 46594
Bernie Shoe Co., 14754
Bert Paley Ltd., Inc., 9381
Bessemer & Lake Erie Railroad Co., 25494, 36718
Best Coat Co. et al., 1556, 27916
Bestform Foundations et al., 55011
Bestform Foundations of Pennsylvania, Inc., 49062
Bethlehem Contracting Co., 51867
Bethlehem Mines Corp., 9382, 18784
Bethlehem Steel Corp. et al., 2947, 3320, 4696, 7731, 7745, 12393, 14754, 17072, 21079, 22090, 23036, 24622, 26149, 26498, 27916, 29375, 32889, 35760, 36718, 46594, 49063, 61041
Bi-Flex International, Inc., 36719
Bi-Flex Marion, Inc., 36719
Big Yank Corp., 50259
Binghamton Steel & Fabricating Co., Inc., et al., 56952
BINY Clothing, Inc., 4131
Bird & Son, Inc., et al., 8863, 23028
Birk Transfer, Inc., 43575
Birmingham Southern Railroad Co., 5094
Blair Footwear, Inc., 44921
Blanchard Shirt Co., et al., 40072
Blaw-Knox Foundry & Mill Machinery Inc. et al.,, 7067, 31464, 31465, 31466
Bliss & Laughlin Steel Co., 9875, 40564
Bloomsburg Mills, Inc., et al., 29367, 38137
Bo-Mar Fashions, Inc., et al., 46594
Boat Anthony & Josephine, Inc., 61041
Boat Gertrude "D" et al., 43587, 57675
Bobbie Knitwear, Inc., 5094, 17072
Boeing Vertol Co., 44922
Bogart Industries, Inc., 38636, 44922
Bogue Electric Manufacturing Co., 57676
Bond Stores, Inc., et al., 4695, 31466
Bonelli, E., & Co., Inc., 51864
Bonon Footwear Co., Inc., 12393
Bootmakers of Sturgeon Bay, Inc., 19930
Bordentown Industries, Inc., 56295
Borg-Warner Corp., 56298
Bort Carlton Co., 9874, 14755
Bostonian Shoe Co., 12964, 12965
Botany 500, 43575
Bound Brook Togs Co., Inc., 14776, 53855
Boyles Brothers Drilling Co., 36720
Boyn-Tan Leathers, Inc., 40565
Brade Sportswear, 47797
Bradley Scott Clothes, Inc., 7732
Braemar Coat Co., 33837
Brandywine Corp. et al., 19478, 26149
Braswell Shipyards, Inc., 14755
Bratti, Peter, Associates, Inc., 11770
Brawer Brothers, Inc., 46595
Brentwood Fabrics Corp., 55490
Bridon American Corp., 18361, 43575, 44922, 44923, 44924, 44925, 44926, 44927
Brier Manufacturing Co., 58644
Bristol Clothing Manufacturing, Inc., 8198
Bristol Fashions, Inc., 22091
Brockway Glass Co., Inc., et al., 51475
Brody, Inc., et al., 53851
Brook Manufacturing Co., Inc., 55014
Brookfield Clothes, Inc., et al., 36720
Brown Shoe Co., 1549, 7733, 14165, 14756, 17073, 26149, 28585, 29846, 36720, 41308, 45655, 51472, 59167
Browning Laboratories, Inc., 40073
Brunswick Pulp & Paper Co., 44927
Brutin & Co. Inc., 44927
Buckbee Mears, Inc., 3321
Bucyrus-Erie Co., 32888
Bulova Watch Co. Inc., 9383
Bunker Hill Co., 24623
Burlington Dress Co., 44928, 46595
Burnham-Edina Manufacturing Co., 14773, 32890
Button Corp. of America et al., 11276, 46596
Byron Clothing Manufacturing Co., 29368
C & C Fashions, Inc., 53855
CEL Fashions, Inc., 49064
CF&I Steel Corp., 5085, 18785, 27916
CMC Industries, Inc., et al., 51868
C & M Coat Co., Inc., 50260
C.P. Clare & Co., 52554
C & P Sportswear, 18784
C. V. Rubin Leather, Inc., 4133
Cadbury Corp., 46596
Cambridge Co., Inc., 21071
Cambridge Tailoring Co., 50260
Camp Bird Colorado, Inc., et al., 28580, 57677
Can Teen Services of Johnstown, Inc., et al., 30927, 58644
Canamex Commodity Corp., 23028
Cannonsburg Pottery Inc., 17073
Canton Textile Mills, Inc., 39195
Cappi Originals et al., 59180
Car-Del-Mar Coat Co., Inc., 7734
Car-Mal Sportswear, Inc., 35126
Cardone & Baker Shoe, Inc., 38637
Cardot Manufacturing Co., 56954
Carlisle Finishing Co. et al., 51865, 56954
Carney Brothers Automotive, 46596
Carnivale Bag Co., Inc., 9875, 57677
Carol Lee Fashions, 61042
Carole Lynn Coats, Inc., 46597
Carousel Slacks et al., 27924, 49064
Carter Rubber Co., 4132
Casa La Gata, Inc., et al., 43588, 59928
Cascade Steel Rolling Mills, Inc., 14756
Catalina Dress Inc., 4132
Catania Clothing Corp., 50752
Cath-Gar Textile Co., Inc., 43576

Cedarock Co., Inc., 24624
Centennial Development Co. et al., 2459, 12965
Central Penn Manufacturing Co., Inc., 30926
Central Slipper Co. of New York, Inc., 55477
Centre Foundry & Machine Co., 14756, 29368
Cepco, Inc., 26150
Cerro Coat, Inc., 5085, 44929
Chain Bike Corp., 44929
Champion Die Inc., 27917
Char-Len Handbags, Inc., et al., 51866, 59928
Charise Fashions, 4133
Charles Lyons Corp., 14757
Charmil Sportswear, Inc., 2948
Chemionics, 26151
Cheney Brothers, Inc., 17074
Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 21080
Chicago Bridge & Iron Co., 46597
Chicago Pneumatic Tool Co., 59167
Chicopee Clothing Manufacturing Co., 11279
Chloride Pyrotector, Inc., 43577
Chromium Mining & Smelting Corp., 40073
Ciba-Geigy Corp., 44930
Cities Service Co., 1550, 24624
City Clothing Co., Inc., 34552
City Girl, Inc., 51868
City Shirt Co., 40565
City Terrace Sportswear, Inc., 50752
Claire's Sportswear, 58645
Clara Fashions, Inc., 40074
Clarence A. Hackett Inc., 25495
Clarke Precision Molding Co. et al., 49061, 58645
Classic Weaving Corp., 17075
Classy Leather Goods Corp., 22100
Clayton Shoe Co. et al., 27917
Cleaners Hanger Co., 50261
Clemo Coat Co., 22100
Cleveland Cap Screw, 38126
Clift Manufacturing Co. et al., 22100
Clifton Clothing Co., 44930
Clinton Engines Corp., 50760
Clinton Mills of Geneva, Inc., 46598
Club Products Co., 59167
Cluett Peabody & Co., Inc., et al., 38635
Coamo Knitting Mills, 5095, 17075
Coats & Clark, Inc., 53856
Coblentz Bags Co., 55478
Codi Corp. et al., 27922
Cohen Clothes, 18785
Coleman Products Co., 29847, 30926, 32199
Colonial Craftsman Pewter Workshop, Inc., et al., 29851, 46598
Colonial Wood Heel Co., 18785
Colorado & Wyoming Railway Co., 30372, 53865
Colorite Textile Printworks, Inc., 2948
Colt Industries et al., 14757, 27918, 32199, 49076
Columbia Belt & Novelties, Inc., 61042
Columbia Iron & Metal Co., 29847
Columbus Coated Fabrics, 59168
Command Print Works, 14166
Communication Co. et al., 29364, 56955
Composite Electric Assemblies, Inc., et al., 15207
Conaway-Winter, Inc., 27918
Conca D'oro, Inc., 5096
Connors Steel Co., 37236
Consolidated Rail Corp., 18786, 18787, 22091, 24625, 25495, 27919, 29370
Continental Can, Inc., 1551
Continental Group, Inc., 61042
Contract Knitter, 9384
Conval Penn, Inc., 43578, 55481
Converse Rubber Co., 28582
Convy Shoe Supplies Co., 5097
Cool-Ray, Inc., et al., 50271
Cooper-Wiss, 50261
Coordinated Trousers, Inc., et al., 50262
Copa Coats, Inc., 46598
Copper Range Co., 55489
Copperweld Corp., 22091
Cornelius Weiss Co., Inc., 41308
Corning Glass Works, 26151, 31467
Coronet Print, Inc., 5097
Cory-Eric, 2949
Country Girls Fashions Inc., 56955
Country Maid Apparel, 5098
Cowin & Co., 58646
Craig Byron Co., 55478
Crane Edmund Corp., 49585
Cranston Print Works, 18361
Cranwood Trucking Co., Inc., 11280
Crescent Glass Co., Inc., 21071
Cresco Men's Outerwear, 7735
Crestlane Clothes, Inc., 32890
Cricket Sportswear, Inc., 52554
Crompton & Knowles Corp., 9875
Crosrol, Inc., 59928
Crown Pants Co., 17076
Crown Zellerbach Corp., 61043
Curcuru Fishing Corp., 59168
Cyclops, Inc., 25496, 26151, 26152
Cyclops Corp., 27931
Cyprus Bruce Corp., 9876
Cyprus Mines Corp., 26152
Cyprus Pima Mining Co., 1551
D & H Sportswear, 14758
D & M Uniform Co., Inc., 53856
D&P Clothing Co., Inc., 46602
Daisy Footwear, Inc., 4134
Dale Brook Finishing Co., 46599
Dan Deb Manufacturing Co., 58646
Dana Corp., 1141
Dana-Marine Fashions, Inc., 14758
Daniel Green Co., 5098
Daniel Meyer Products Corp., 49071
Danny Dare, Inc., 58647
Dante Fashions, 49064
Darling & Co., 46599
Data-Flo of New Jersey, Inc., 40074
Davenshire, Inc., 46600
David Hober & Co., Inc., 55479
David Karp Inc., 25496
David Sportswear, Inc., 57678
Davis & Furber Machine Co., 35126
Davis Sportswear, Inc., 11280
Davis-Lynch Glass Co., 40075, 50753
Day Mines, Inc., 46600
Dayton Industries, Inc., et al., 59169
Dayton Malleable, Inc., 44930, 44931
Dee Jay, 34552
Dee-Mure Brassiere Co., Inc., 44931
Defiance Bleachery Corp., 59929
Del-Ba Coat, Inc., 50753
Delaval Turbines, Inc., 14166, 49585
Delaware Alloy Forge Co., 33839
Delaware & Hudson Railway Co., 34553
Delcor Fashions, 51868
Delta Electric Co. Inc., 9384
Delton Clothing, Ltd., 47325
Deluca Sportswear, Inc., 46601
Devon, Inc., 11768
Diamond Shamrock Corp., 39456
Diane Handbags, Inc., 25496
Dictaphone Corp., 17076
Dino Clothing Co., 39456
Dirzis Products Co., Inc., 50262
Dix Mills, Inc., 47798
Dixie Shoe Corp., 44931
Dole Pineapple Co., 14759
Dom Rose Fashions, Inc., 46601
Donner-Hanna Coke Corp., 25198
Dorado Fabrics, Inc., 25497
Dorel Group Companies, 55479
Dorothy Fashions, Inc., 4134
Dove Processing Co., Inc., 4135
Dover Conveyor & Equipment Co., Inc., 50263
Dowen-Zier-Knits, Inc., 58648
Duluth, Missabe, & Iron Range Railway Co., 38637
Duplan Corp., 57678
Duplan Fabrics, Inc., 56956
Dury Clothing Co., Inc., 1142
Duval Corp., 4138, 4142, 4149, 55480
E and W of Illmo, Inc., 44932
E. F. Johnson Co., 4136
E.H. Edwards Co., 27919
E. I. Du Pont de Nemours & Co., Inc., 51869, 57679
E & M Coat Co., 47798
E Plus E. Inc., 50753
E.S.I., Inc., 33839
E & S Sportswear, Inc., 17877
E.T. Irvin Works, 24625
E & W of Dover, Inc., 59169
E&W of Manila, Inc., 61043
Eagle Clothes, Inc., 22092, 40075
Eagle-Picher Industries, Inc., 29848, 29849
Earth Shoe Corp., 14759
East Range Clinic, 14759
Eastern Sportswear Manufacturing Co., Inc., 23028
Eastman Manufacturing Co., Inc., 49065
Eastside Sportswear, Inc., 4135, 35760, 38137
Edgewater Steel Co., 29849
Edinburg Manufacturing Co., 14167
Edmos Corp. et al., 29364
Eggie Motor Co., Inc., 14168, 21072
El Greco Leather Products Co., Inc., 34553
Elco Dress Co., 8198, 9877
Elder Manufacturing Co., 44932
Elizabeth Fashions, 49586
Ellwood City Forge Corp., 1143
Elm Shank & Heel Co., Inc., 5098
Ely & Walker, Inc., 29370
Embassy Apparel, Inc., 29850
Emenee Manufacturing Corp., 9877
Emil Fashions, Inc., 47326
Empress Handbag Co., Inc., 44933
Encore Shoe Corp., 14168
Ensign Coil Co., 49586
Erie Mining Co., 4137, 9879, 11768, 12396
Erie Scientific Co. et al., 43589
Erie Technological Products, Inc., 55480
Ermar Manufacturing Co., Inc., 8209
Escapades Fashion Inc., 49586
Ethan Industries, Inc., 19930
Ethel Manufacturing, 32890
Eureka Sugar Mill of Sugar Corp. of Puerto Rico, 23029
Eva Fisher Dress Co., 43577
Evart Products Co., 29850, 30927, 32199
Everett Levinsohn Corp., 38638
Evy Footwear Co., Inc., 40076
F & A Fashions, 28585, 56295

F. E. Olds & Son, Inc., 43578
FMC Corp., 53857
F.M. Weaver & Co., Inc., 9878
F & P Coat Co., 44933
F/V Alice J., 27920
F/V Boat Gaetano S., Inc., 57682
F/V Cap'n Bill, 44934
F/V Divine Creador, 26153
F/V Gale, 26154
F/V Jennifer & Aaron, 23029
F/V Johnny O., 23030
F/V Kathryn Marie, 26154
F/V Leona Louise, 25199
F/V Mary Ann, Inc., 57682
F/V Memco, 24629
F/V Michael Ann, 23030
F/V Peter & Linda, 47798
F/V Petrel, 45655
F/V Raider II, 26154
F/V Reneva, 26155
F/V Shirley and Roland, 25199
F/V Victory II, 46604
F/V Zerda, 26155
Fabric Fire Hose Co., 31467
Fabrics by Joyce, Inc., 27920
Fairfield Glove Co., 14773, 14774, 49065
Fairfield-Noble Corp. et al., 25197, 57680
Fairfoot Shoe Co., 34554
Fairhaven Corp., 14760
Fairview Sportswear, Inc., 7736
Fajardo Sugar Mill of Sugar Corp. of Puerto Rico, 23031
Fall River Clothing Manufacturing Co., 11281
Farmland Industries, Inc., 50263
Farwell Manufacturing, Inc., 56296
Fashion Clothing, Inc., 36705
Fashion Prints, 46602, 46603
Favorite Overall Co., Inc., 37236
Fay Sportswear Co., 36705
Fay-Del Coat, Inc., 8198
Federal Mogul Corp., 22092
Fenton Shoe Co., 8199
Ferag, Inc., 57680
Filper Corp., 14760
Fin-Tex VII, Inc., 51869
Fine Craft Coat Co., Inc., 24150
Firestone Tire & Rubber Co., 57681
Fisher Dress Co., 7736
Flair Footwear, 29371
Flora Fashions, Inc., 55481
Florsheim Shoe Co., 17077, 18787, 18788, 21072, 22093, 36706, 49066
Ford Motor Co., 1144, 1145, 14169, 38638
Forest Fabrics, Inc., 27920
Formflex Foundations, Inc., 38127, 49066, 53857
Fortune Sportswear, 53858
Frank M. Sheesley Co., 28587
Frank Saltz & Sons, Inc., 38138
Franza Coats, 46603
Fraser-Johnston, 51870
Frederick H. Burnham Co., 11767, 32890
Freedom Electronics & Engineering, Inc., 49066
Freeland Shirt Co., 52555
Frolic Footwear, 14760, 31467
Frontier Spar Corp., 57681
Frontier Steel Co., Inc., 17078
Ft. Smith Structural Steel Co., 17078
Fulton Clothes Co., Inc., 45655
Fur Modes, Inc., 47326
Future Fabrics Corp., 31468
GAF Corp., 11768, 14761, 31468, 37237, 57682
GAMS, 43579
G.C. Zarnas & Co., Inc., 38127
G&G Food Corp., Inc., et al., 51473
G & H Manufacturing Co., 52555
G. Leblane Corp., 38639
G & S Coat, 49587
G.T., Inc., 11769
GTE Sylvania, Inc. et al., 53852, 55482
Galeton Production Co. et al., 46591, 55482
Garland Corp., 39457
Gaylor Fashions, Inc., 36706
Gaynor-Stafford Industries, Inc., 12966, 12969
General Cable Corp., 43579
General Electric Co., 11281, 19478, 24626, 32891, 57683
General Foods, Inc., 12394
General Instrument Corp., 14762, 40572, 49067, 58648
General Motors Corp., 1553, 18789, 38639, 58548
General Refractories Co., 50760
Genesco, Inc., 44934, 55483, 61044
George Heller, Inc., 47326
George's Manfacturing Co. et al., 1554, 38138
Gerald Leather Goods Corp., 30927
Ghia Sportswear, Inc., 28582
Gilbralter Pacific Corp., 59170
Gilmore Steel Corp., 17084, 17552
Girltown Corp., 32891
Glamour Fashion, Inc., 46604
Glen Lyon Garments, Inc., 8199
Gloria Coat Corp., 38127
Gold Line Connectors, Inc., 8200
Goldberg & Susseles, Inc., 32892
Golden State Building Products, Inc., 38637
Goldstein Footwear, Inc., 9385
Goodgal Co., Inc., 37238
Goodyear Tire & Rubber Co., 8208, 39195, 50754
Goralnick Shoe Trimming Co., Inc., 17079
Gould, Inc., et al., 39457
Grace Coat Co., 43579
Gramercy Mills, Inc., 61045
Grand Finale, 7737
Grandoe Corp., 9878
Granite Worsted Mills, Inc., 47799
Graviner, Inc., 50754
Great Bay Sportswear, Inc., 27921
Great Eastern Textile Printing Co., 1146, 8200
Great Western Railway Co., 5099, 14169
Great Western Steel Co., 9879
Great Western Sugar Co., 5100, 14169
Greene Tanning Corp., 11769
Greenfield Components Corp., 21073
Gregg Lawrence Co., Inc., 40076
Greif & Co., Inc., 52555
Griffith-Custer Steel Co. et al., 46604, 59170
Gulant & Maslin, Inc., 40566
Guterl Special Steel corp., 46605
H.D. Lee Co., Inc., 52556
H & D Sportswear, Inc., 41309
H. Margolin & Co., Inc., 35127
Haas Tailoring Co., 22101
Hackney Corp., 50755
Halltex Clothing Co., 26155
Handi-Bag Co., Inc., et al., 43580
Handley Textiles, Inc., 17079
Hanna Furnace Corp., 5100, 14170
Hanna Nickel Mining Co. et al., 38128
Hanna-Barbera Productions, Inc., 17080
Harbison-Walker Refractories, Inc., 26156
Harley-Davidson Motor Co., Inc., 33840
Harris Corp., 26156
Harris Fishing Corp., 61045
Harrisburg Manufacturing Co., 27921
Harrison Western Corp., 36706
Harry Irvin Inc., 24626
Hart, Schaffner & Marx Clothes, 14762, 25200, 37237, 59171
Haspel, Inc., 36707
Haspel Brothers Inc., 61046
Hausser Scientific, 5101
Hawthorne Tanners, Inc., 22093
Hecla Mining Co., 2951, 52556
Helene Dee, 14762
Helga, Inc., 43580
Hennoch Manufacturing Contracting Corp., 17553
Henry Richards Co., Inc., 25200
Heppenstall Co., 57683, 59929
Hepsun Sportswear, 44935
Hercules Trouser Co., 14763, 19930, 52557, 53858
Herman Geist Inc., 28583
Heveatex Corp., 44935
Hi-Craft Clothing, 26157
Hibbing Taconite Co., 4139
Hibshman Screw Machine Products, Inc., 25200
Hickey-Freeman Co., Inc., 36707
High Fashion, Inc., et al., 45656, 51870
High Style Corp., 37238
Highlander Sportswear, Inc., 4139
Hilo Iron Works, Inc., 22101
Hilo Tansportation & Terminal Co., Inc., 1533
Hilton Coat & Suit Co., 52558
Hilton Manufacturing Co., 23031
Holden & Quick, Inc., 46605
Holliston Mills, Inc., 1146, 1147
Holly Dress Co., 1147
Holly Sugar Corp., 1148
Honey Bee Sportswear, 55015
Horace T. Potts Steel Service Center, 38131
Houdaille Industries, Inc., 59171
Houston ELectronics Corp., 49068
Howard Stores Corp., 38640
Hubbard & Co., 14764
Hudson Pants Co., Inc., 40077
Hudson Wire Co., 46606
Hy-Gain de Puerto Rico, Inc., 21080
Hy-Gain Electronics Corp., 17080
Hy-Grade Coat Co., Inc., 46606
Hy-Grade Sportswear Co., Inc., 46606
Hyde Athletic Industries, 35127
Hydril Co., 25497
Hydro Weave, Inc., et al., 14764
Idarado Mining Co., Inc., 21080
Igualdad Suga Mill, 55483
Imaginetics International, Inc., 34554
Impala Textile, Inc., 32892
Imperial Pants Co., 51474
Imperial Reading Corp., 44936
Industrial Clean Air, 27922
Industrial Service Centers, Inc., 5101
Ingersoll Steel Co., 18789
Inspiration Consolidated Copper Co., 7735, 14176
Intercontinental Petroleum Corp., Inc., 55483
Interlake, Inc., et al., 4696, 40566, 50264, 51474, 58649
International Coat, Inc., 51871
International Hat Co., 5101
International Manufacturing Co., 14170

International Mill Service, Inc., 38129
International Paper Co., 59172
International Shoe Co., 25497
International Shoe Machine Corp., 5102
International Silver Co., 4140, 59930
International Telephone & Telegraph Co., 43581
Interpace Corp., 40566
Interstate Vendaway, Inc., 11282
Irving Sportswear, 47327
Irwin Toys, Inc., et al., 21073
Isaacson Steel Co., 14764
Italcraft, Inc., 46607
J.C. Manufacturing Co., 28585
J. F. McElwain Co., 17081
J & J Fashions, Inc., 36708
J & M Fashions, Inc., 37238
J. Molofsky Sons, Inc., 34555
J.P. Stevens Co., 55484
J.R. Clark Co., 32900
J & R Fashions, Inc., 37239
J & R Manufacturing Co., Inc., 47327
J. Schoeneman Co., 34556, 34557
J & T Sportswear, Inc., 23032
JZ Coat Co., 43581
Jacob Finkelstein & Sons, Inc., et al., 21073
Jaffe Brothers, Inc., 11769
James H. Beans Foundry Co., 24627
Janice M. Inc., 57684
Jarmel Fabrics, Inc., 38129
Jasper Brassiere Co., 49068
Jay Garment Co., 22093, 28582, 29371
Jaymar Ruby Co., 37239
Jean Arthur Sportswear et al., 17552, 27926
Jean Fashions, Inc., 51477
Jeans & Gauvin Pattern Co., Inc., 32892
Jemy Sportswear, Inc., 14171
Jerrold Electronics Corp., 53859
Jersey Made Fashions, Inc., 51871
Jessop Steel Corp., 34555
Jo-Dan Apparel, 57684
Jo-Mars Sportswear, Inc., 19931
John B. Conomos Inc., 37236
Johns Hopkins University et al., 19255
Johnson Steel & Wire Co., Inc., et al., 38634, 59172
Johnstown & Stony Creek Railroad Co., 49587
Jolee Fashions, Inc., 56296
Jones & Laughlin Steel Corp., 12968, 17081, 17553, 24627, 26157, 31469, 32893, 32894, 33841, 33842, 33843, 37239, 38640
Jordan Manufacturing Corp., 26157
Joseph Pickard's Sons Co., 46607
Joseph R. Palma Inc., 18362
Jubilee Coat, Inc., 40077
Jules L. Simon Inc., 61046
Julius Goldstein Shoe Manufacturing, Inc., 14765
Julius & Sons, Inc., 23033
June Sportswear Co., Inc., 28583
K.A.L. Fashions, 44936
K & D Clothing Manufacturing Co., 29852
K & G Manufacturing Co., Inc., 7738
K & M Sportswear, Inc., 30929
Kadimah Knits, Inc., 43581
Kaiser Steel Corp., 5102, 14765, 30930, 43582
Kala Manufacturing Co., 14765
Karmel Textile Co., 14172
Kay Windsor Inc., 33843
Kaye Coat Co., Inc., 49069
Kazoo, Inc., 31469
Keencast Manufacturing Corp., 22102
Keibler Industries, Inc., 14172
Kennecott Copper Co. Corp., 51477
Kennecott Copper Corp., 29374, 38125, 43577, 46607, 47303
Kennecott Refining Corp., 38129
Kenneth Manufacturing Co., 1148
Kensco Communications, Inc., 14765
Kentucky Electric Steel Co., 18791
Kerramerican, Inc., 12394
Kessler, William B., Inc., 31469
Keystone Consolidated Industries, Inc., 11282
Keystone Fireworks Mfg. Co., Inc., 49069
Kirson Handbags, Inc., 47303
Knit Mill Store, 57685, 57686
Knit Studios, U.S.A., Inc., 51871, 51872, 51873
Knopf Sportswear, Inc., 7737
Koppers Co., Inc., 50761
Kramer Corp., 14172
Kris, Inc., 55015
LBJ Garment Corp., 5104
L.J. O'Neill Shoe Co., 25499
L.N. Gross Co., 56296
L. R. Textiles, 59173
L & S Fashions, Inc., 38130
Laclede Steel Co., 21074, 23033
Lady Jersey, 38641
Lady Prestige, Inc., 40077
Lafemme Knitting Mills, Inc., 37239
Lake Center Industries, 59173
Lamar Coat, Inc., 44937
Lamay Coat Co., 47304
Lamson & Sessions Co., 47317
Land Manufacturing Co., 32895
Lanham Clothes, 8201
Lawrence Clothes, Inc., 40567
Lawrence Garment, Inc., 11283
Lawrence Garment Co. et al., 29852
Lawrence Maid Footwear, Inc., 53859
Lawrence Manufacturing Co., 55015
Leader Dyeing & Finishing Co., Inc., 4140, 17082
Leather Sportswear, Inc., 49069
Lebanon Steel Foundry, 49070
Lebow Brothers, Inc., 29372
Leeds Travelwear, 44937
Leemar Corp., 26158
Leemar Knitting Mills, Inc. et al., 17082, 22094, 61038
Leesona Corp., 35128
Lefeton Custom Tailoring, Inc., 44938
Lehigh Structural Steel Co., 38641
Lenoir Hickory Knitting Mills, Inc., et al., 51476, 58649, 58650
Leslie Fay, Inc., 8201, 33841
Lesnow Manufacturing Co., Inc., 17554
Levi Strauss & Co., 49588
Levi-Ottenheimer, 49070
Lexcraft, Inc., 47328
Liberty Belle Fishing Corp., 25500
Lido Fashions, Inc., 43583
Lilli Ann Corp., 29852
Lincoln Sportswear Co., Inc., 17082
Linden Manufacturing, Inc., 29372
Lion Manufacturing Co., 52559
Lish Enterprises, Inc., 5104
Little Infant, 9385
Littzi Fashions, 5105
Lorraine Handbags, Inc., 34557
Losito Mushroom Corp. et al., 33843
Louisiana-Pacific Co., 33844
Louisville & Nashville Railroad Co., 55016
Lowanstein, M., & Sons, 26500
Loyal Cloak Co., 49071
Lucky Knitting Mills, 26499
Lukens Steel Co., 21074
Lurie Sportswear, Inc., 34558
Lyndhurst Coat, Inc., 49588
Lyndwood Fashions, 1557
M and D Shop, Inc., 44938
M & D Coat Co., Inc., 51873
M. Ehrenberg Sons, Inc., 39459
M. Hoffman Co., Inc., 47306, 51474, 59174
M & O Sportswear, 36709
M&S Co., Inc., et al., 26158
M & T Fashions, Inc., 58650
M.T. Shaw Inc., 34558, 61048
M. Wile & Co., Inc., 53860
M-tron Industries, Inc., 39460
Ma-Zel Sportswear Manufacturing, Inc., 58650
Machine Design Service, Inc., 19931
Macon Shirt Co., 9385, 17083
Madeline May Co., 28588
Madison Wire Co., 44939
Mafco Textured Fibers, 37240
Magaw Electric Co., 14766
Magnecraft Electric Co., 52559
Malan Dyeing & Finishing Co., 5105
Malden Knitting Mills, Inc., 22094
Mallory Controls Co., 29373
Mandlebaum Clothing Co., Inc., 39459
Maner Sportswear, Inc., 1149
Manes Organization, Inc., 29855
Manhattan Coat Corp., 36708
Manhattan Fashions, Inc., 34558
Manhattan Shirt Co., Inc., 47304
Manufacturing Group Inc., 38130
Mara Manufacturing Co., 4141
Marathon Manufacturing Corp., 52560
Margaret Doll Clothing Co., Inc., 1559
Mari Anne Bag Corp., 5106
Marie Coats & Suits, Inc., 50264
Marion Dyers, 52560
Markay Handbags, Inc., 5106
Marshall Ray Corp., 22095, 53860
Maurice II Knitting Mills, Inc., 40567
Mavest, Inc., et al., 50755
Maxwell & Rothchild, Inc., 8865, 17083, 30929
Mayer, Rothkopf Industries, Inc., 40078, 40080
Mayflower Coat Co., 24627
McAuley Textile Corp., 57687
McCarthy Sole & Leather Co., Inc., 52560
McClure Steel Manufacturing, 32895
McDonalds's Enterprises, Inc., 14173
McGregor-Doniger, Inc., 17083, 44939
McKeesport Connecting Railroad, 8866, 18362
Medalist of Sikeston, 17555
Medford Knitwear Mills, Inc., 18792
Medical University of South Carolina et al., 19256
Meramec Mining Co., 1559
Mercer Clothing Co., Ltd., 27926
Merit Clothing Co., Inc., 14767
Methuen International Mills, 7739
Miami-Inspiration Hospital, Inc., 38131, 47306
Michael Berkowitz Co., Inc., 1157
Michaels Stern & Co., 8202, 9386, 9387
Michelle Rena Fashions, Inc., 47305
Mickey Blumfield Inc., 32896
Mickey Madann Handbags, Inc., 14767
Microdot, Inc., 38644, 38645
Mid-Hudson Leather Goods Co., Inc., 36708
Middleburg Manufacturing Co., 52561

Midland Garments, Inc., 59174
Midland-Ross Corp., 1558
Midwest Footwear Co., Inc., 56297
Midwest Steel & Alloy Corp., 23033
Mighty Mac, Inc., 40567, 40568, 47307
Mil Garment Co., Inc., 22102
Milco Industries, 37240
Miller Abattoir Co., 2953
Miller Shoe Co., 14767, 14768
Milt Posner Fur Corp., 47305
Milwaukee Tool & Equipment Co., Inc., 22102
Mirando Manufacturing Co., Inc., 29373
Miss Mayfair Originals, 4143
Mississippi Valley Structural Steel, 29373
Mister Dino, 19932
Model Sportswear, Inc., 4143
Modern Clothing Co., 17555
Modform, Inc., 35128
Mona Lisa Coat Co., 37241
Montco Manufacturing Co., 61047
Moody II, 38138
Moore Co., Inc., 61047
Moore Shank Co., 5107
Morris White Fashions, 55484
Morrison Steel Co., 59931
Mt. Hope Mining Co., 34559
Munsingwear, Inc., 29853
Mutual Manufacturing Co., 8210
NL Industries, Inc., 9879, 14774
N & R Fashions, Inc., 43583
Nagler Manufacturing Corp., 30373
Nannette Manufacturing Co., 56956
Natalie Ann Fashions, Inc., 51478
National Apparel Industries, Inc., et al., 36709
National Can Co., 9388
National Electric Manufacturing Co., Inc., et al., 4144
National Garment Co., 27926
National Steel Corp., 22095, 31470
National Steel Products Co., 14768, 36710
National Steel Service Center, Inc., 29853
National Supply Co., 22103, 22104
Needlecraft Dress Manufacturing Co., Corp., et al., 47307
Neevel Luggage Manufacturing Co., 5107
Neiman Tool & Machine, 22096
Neko Togs, 53860
Nelly Don, Inc., 50264, 51874
Nelson Knitting Mills, 44940
Nevada Northern Railway Co., 30930
New B. Garment Co., 32896
New Brunswick Children's Coat Co., 53861
New England High Carbon Wire Corp., 52561
New England Sports Wear Co., 31471
New Jersey Zinc Co., 33845
New Knit Manufacturing Co., 14173
Newark Textiles Printing, Inc., 19932
Newmont Exploration Ltd., 51478, 51479
Newport Finishing Co., 4145
Nieman Tool & Machine, 8862
Niffty Creations, Inc.; correction, 53850
Nirenberg & Salzman Co., Inc., 59174
Noble Knit Manufacturing Co., 39460
Normal Shoe Co., Inc., et al., 24628
Norrwock Shoe Co., 9880, 47307
Norstan Industries, Inc., 52562
North American Refractories Co., Inc., 9388
North Bergen Leather Products Co., 49072
North & Judd/Wilcox Crittenden, 17084
North Terminal, Inc., 40568
Northampton Steel Corp., 61048
Northern Engineering Laboratories, Inc., 31471
Northern Ohio Sugar Co., 55484
Northern Shoe Co., 14174
Northwestern Steel & Wire Co., 38643
Novelle Fashions, Inc., 49072
Novelty Footwear, Inc., 30931, 59175
Noymer Manufacturing Co., 19933
Nu Look Manufacturing Co., 47308
Oahu Sugar Co., Ltd., 14174
Oakhall Sportswear, Inc., 58651
Offspring Fashions, Inc., 59175
Ogden Alloys, Inc., 57687
Ohio Ferro-Alloys Corp., 4145, 19933
O'Keefe Drilling Co., Inc., 14774
Olin Corp. et al., 21075
Olympia Industries, Inc., 14175
Omega Last Co., 22096
Onondaga Silk Co., Inc., 24628
Owens-Illinois, Inc., 4146, 30931
Oxford Textile Finishing Co., Inc., 1560
Paceco, Inc., 49072
Pacific Motor Trucking Co., 47328
Pacific States Steel Corp., 37241
Pacific Tube Co., 17084
Paley Associates, Inc., 47308
Pam Coat Co., Inc., 47308
Pan American World Airways, Inc., 59176
Pant Craft Co., 38644
Paragon Wire & Cable Corp. et al., 21075
Paramount Coat Co., Inc., 47800
Paris Knitting Mills, Inc., 50756, 51874, 51875, 51876
Park City Ventures, 29853
Parker Hanifin Corp., 36713
Parker Manufacturing Co., 53861
Parkview Clothes, 22104
Parry Footwear, Inc., 35129
Parsons Fashions, Inc., 7739
Pat Jo Blouse Co., 29375
Patapsco & Back Rivers Railroad Co., 12395
Paterson Cloak & Suit, Inc., 47800
Patmore Coat Co., 11283, 40078
Paul Modes, Inc., 7740
Paul Terri Sportswear, Inc., 47309
Paulina Sportswear, 34559
Peerless Machine Co., 5108
Pen-Jay, Inc., 50756
Penn Footwear, 26158
Penn State Belt & Buckle Co., 7740
Penn-Dixie Steel Corp., 14769, 30932, 34559, 37242
Pennsy Coat Co., 49589
Pennsylvania Engineering Corp., 32896
Pennsylvania Tire & Rubber Co. of Mississippi, Inc., 47309
Perennial Print Works, Inc., et al., 1149, 11277
Perkin-Elmer Corp., 41309
Perri Sportswear, Inc., 59176
Personal Sportswear, 17085
Peter James Inc., 11770
Petrocelli Clothes, 53862
Phelps Dodge Corp., 2949, 2950, 2954, 2955, 2956, 9881, 40569, 40570, 40571, 40574, 56297
Phelps Dodge Mercantile, Inc., 36710
Phelps Dodge Refining Corp., 43584
Philadelphia, Bethlehem & New England Railroad Co., 22096, 31471
Phillip's Sportswear, Inc., 9881
Pimbi Limited, 57688
Pinto Island Metals Co., 9389
Pisces Fashions, Inc., 47310
Pittsburgh Annealing Box Co., 18792
Pittsburgh Hat & Cap Co., Inc., 61048
Pittsburgh & Lake Erie Railroad, 47310
Pittsburgh Metals Purifying Co., 18793
Plesco Products, Inc., 1150, 1151
Poirette Corset Co., Inc., 51877
Ponce Pearl, Inc., 24629
Pond Lily Co., 57688
Pori, Inc., 51480
Prairie Manufacturing Co., 2956
Pratt Manufacturing Co., 43584
Precision Ball Bearing Co., 24629
Precision Gas Products, Inc., 47311
President Sportswear, Inc., 51877
Prestonsburg Shoe Co., 17556
Primo Coat Corp., 47311
Prints Almo, Inc., 14177
Prints-N-Things, Inc., 32897
Proctor Products, Inc., 27927
Professional Resource Consultants, Inc., 57688
Profile Industries, Inc., 2021
Progressive Uniform Manufacturing Co., 55485
Prophet & Friends, Inc., 8202
Prosperity Garments, 27927
Proximity Print Works, 3322, 24630
Publicker Industries, Inc., 47311
Publix Meridian, Inc., 21076
Publix Shirt Co., 9882
Pullman Berry Co., 24630
Pullman Standard, 22097
Puritan Co., Inc., 36711
Pyr-A-Larm, Inc., 50761
Q & T Coat Corp., 47312
Q-T Shoe Manufacturing Co., Inc., 53862
Quaker Alloy Casting Co., 35761
Quality Glass Co., 40080, 51481
Quality Sportswear, 11771
Quanex Corp., 14769, 21076
Quasar Electronics Co., 4146
RCA Corp., 2956, 18793, 38139, 47312, 50756
RCR Sportswear, Inc., 47329
R.C. Still Co., Inc., 1560
R & K Apparel Co., 5108
R & S Garments, Inc., 58652
RTE Corp., 18794
Rain Ducker Inc., 21081
Rain Rose, Inc., 50265
Rainbow Girl Coat Co., Inc., 9389
Ranchers Exploration & Development Corp., 23034
Randy Coat, 34560
Rani-Merona Corp., 32897
Rani-Merona of New Hampshire, Inc., 32898
Rapid American Menswear, Inc., 33838
Raymond International Inc., 50265
Raytheon Co., 17085
Red Bank Clothing Manufacturing Co., Inc., 34560
Reda Pump Co., 58651
Reece Corp., 11771
Reed Forest Products, Inc., 22097
Regal Bag Co., Inc., 29854
Regal Fashions Co., 51481
Regal Sportogs, Inc., 49073
Regency Electronics, Inc., 22097
Reid Stevens, Inc., 1151
Reid-Meredith, Inc., 59931
Reidbord Brothers Co., Inc., 44928, 49589, 59177
Reis, Robert, & Co., 8211
Reliable Coat Co., Inc., 22098

Kemm Fashions, Inc., 47329
Renco Manufacturing, Inc., 38132
Republic Steel Corp., 12968, 14769, 14770, 19934, 24631, 24632, 25200, 25201, 25202, 25203, 25204, 30932, 36711, 49073
Richard Tanning Co., Inc., 18794
Ricky Fashions, Inc., 8203
Riddell, Inc., 55491
Rite Coat, Inc., 55486
River Street Sportswear Corp., 49074
River Terminal Railway Co., 25205
Riveredge Corp., 47313
Riverpark Manufacturing Co., 43585
Riverside Manufacturing Co., Inc., 17556, 53863
Riverside Metals Co., 9390
Riverside Sportswear, Inc., 8203
Ro Tarr Fashions, Inc., 47329
Roane Electric Furnace Co., 39461
Robert Hall Clothes, 4147, 4148, 17086
Robert Hall Manufacturing Co., 18362
Robert Lawrence Inc., 40571
Robert Lewis, Inc., 29854
Robert Shoe Co., Inc., 22098
Robinson Apparel, Inc., 28584
Robinson Excavating & Trucking, 47313
Rocco Handbag Corp., 22105
Rochester Button Co., 45656
Rochester Clothing Corp., 44941
Rochester Shoe Corp., 18794
Rockland Weaving, 38132
Rockwell International Corp., 1152, 1153, 51481, 55016, 56298
Roma Printing & Finishing Corp., 29375
Roman Ceramics Corp., 47314
Ronson Corporation of Delaware, 32898
Rosalba Fashion Co., Inc., 40572
Rose Marie Coat Co., 47314
Rose Venice, 29376
Rosemary Fashion Coat Co., 38132
Rosemer Manufacturing Co., 55486
Rosenkranz Brothers, Inc., 40079
Roth, Max, Leather Goods Corp., 33844
Roth Lecover, Inc., 5109
Roth Transfer Print, Inc., 1153
Rubber Corp. of Pennsylvania, 30933
Rutgers Cloak Manufacturing Co., Inc., 53863
S & B Coat Co., 47314
SCM Corp., 43576, 55477
S. D. Sales Corp., 21082, 31472
S & F Coat Co., Inc., 47314
S. J. Knits, Inc., 43585
SKF Industries, Inc., 14177, 44940, 55486
SPN Sportswear Co., Inc., 50266
Sabre Enterprises, Inc., 36711
Saint Laurie, Ltd., 27927
Salamanca Yarns, Inc., 8211
San Francisco Shirt Works, Inc., 18795
San Francisco Wildflowers, Ltd., 19934
Sandvik Conveyor, Inc., 53864
Sangamo-Weston, Inc., 53864
Sarajo Manufacturing, 55487
Scotese Brothers, 37243
Scripto, Inc., 17071
Sea-Land Service, Inc., 24632, 25205, 27928, 59177
Selma Industries, Inc., 59177
Selmer Co., 21082
Semiconductor Circuits, Inc., 14770
Senate Button Co., 47315
Sentar Glass Co., 14770
Serafina II, Inc., 57689
Servomation Corp., 18795
Sharlyn Fashions, Inc., 36712
Sharon Steel Co., 19934, 19935
Sharon Steel Corp., 26153, 38140
Sharon Tube Co., 31473
Shawmut Tanning Co., 32899
Sheldahl, Inc., 18796
Shells of Miami, Inc., 51878
Shenango, Inc., 4149, 11772, 11773
Sher Lisa Co., Inc., 36712
Sherwin Williams Co., 38639
Shirley Willett Co., 30933
Shutzer Industries, Inc., 50266, 52562
Shutzer Manufacturing Co., Inc., 8204
Siluria Textiles, Inc., 47315
Silver King Mining & Milling Co., Inc., 41309
Simmons Co., 27928
Simon's Outerwear, Inc., 36712
Singer Co., 1552
Slater Paper Box Co., 61049
Snappy Garments Mfg. Co., Inc., 51481
Snob Fashions, Inc., 34561
Solo Products Corp., 12395
Soule Steel Co., 17086, 26500, 28581
Southern Electric Steel Co., 14771, 30933
Southern Union Refining Co., 40079
Southwestern Bell Telephone Co., 19935
Speakman Co., 1154
Speed Tex Corp., 55488
Speer Optical Corp., 51878
Sporn Dress Co., 50762
Sportswear Associates, Inc., 28583
Sportswear International, Inc., 47316
Springfield Specialty Motors, 14771
Spun Steel Co., 49074
St. Croix Corp., 21083
St. Joe Minerals Corp., 57689
St. Joe Zinc Co., 44942
St. Joseph Structural Steel Co., 21076
St. Louis-San Francisco Railroad, 47316
Stackpole Carbon Co., 5109, 5110
Stafford Clothing Manufacturing Co., 11284
Stafford Garment Manufacturing Co., 14177
Standard Rubber Products, Inc., 18796
Stanley Manufacturing Co., 7741
Star Coat Manufacturing Co., Inc., 49074
Star Fashion Coat Co., 44942
Star Sportswear Manufacturing Corp., 50267
Stedfast Rubber Co., Inc., 8204
Stein & Koltis Enterprises, Inc., 14178
Steiner-Lobman Manufacturing Co., 58652
Steven Knitting Mills, 49075
Stop-Fire, Inc., 59178
Store Decor, Inc., 17086
Stride Rite Manufacturing Corp., 8205, 9392, 9883, 49590
Stupp Brothers Bridge & Iron Co., 12396
Stupp Corp., 31473
Stutz Products Corp., 21083
Style Sportswear, 40573
Stylish Sportswear Co., Inc., 47330
Sugar Corp. of Puerto Rico, 23032, 23035, 53850
Summerfield Industries, Inc., 47801
Sunapee Shoe Co., 5110
Super Craft Coats, Inc., 47316
Super Knitting Mills, 57690
Superba Mills, Inc., 11284
Superior Cutting Die Co., 18797
Superior Tube Co., 17087, 17556
Supreme Pants Co., 30934
Sussex Clothes, Ltd., 40573
Swank Refractories Co., 47801
Syntex Fabrics, Inc., 9883
Szabo Food Service Co., 58653
T.I. Swartz & Sons, Inc., 38644
TRW Crescent Wire & Cable Co. Division, 30373, 49076
TRW/IRC, Inc., 8866
T&S Apparel, Inc., 58653
Tag-a-long Handbags & Accessories, Inc., 40574
Tallassee Mills, 9884
Tara Knitting Mills, Inc., 41310
Target Togs, Inc., 57690
Techron Corp., 12397
Tel Aviv Fashions, Inc., 36713
Teledyne Vasco, Inc., 47317
Tenn-Tex Alloy Corp. of Houston, 49590
Tennessee Forging Steel Corp., 18797, 19935
Terry Slipper Corp., 11285
Texaco Inc., 57690
Texfi Industries, Inc., 5110
Textron, Inc., 47330
Thealinda Knitting Mills, 8205
Thealinda Knitting Mills, Inc., 14178
Thermatomic Carbon Co., 35761, 45657
Thomas Knitting, Inc., 23035
Thomas Menswear Corp., 59931
Thompson Steel Co., Inc., 17557
Tiara Coat Fashions, Inc., 47330
Tiara Footwear, Inc., 61049
Tick Tock Frocks, Inc., 29855
Tim Coil & Loop Co., 29376
Tim Sportwear Co., Inc., 14178
Tima, Inc., 49075
Timex Components, Inc., 53865
Timex Corp., 35129, 35130
Timkin Co., 27928
Titanium Enterprises, 53866
Titanium Metals Corp. of America, 47318
Tobin Packing Co., Inc., 56956
Tonia Fashions, Inc., 51879
Tony's Outlet, Inc., 47318
Tornetta's Motor Trucks, Inc., 9392, 19936
Torsion Balance Co., 56957
Totes, Inc., 26159
Tower Fashions et al., 8863, 18797
Toy-Mark Corp., 1154, 12397
Transitron Electronics Corp., 22105
Travis Mills, Inc., 51879
Triangle Sportswear, 39461
Tricolor Mills, Inc., 11285
Trimfoot Co., 7741
Trio Dyeing & Finishing Co., Inc., 9884
Tromer Tromadero, Inc., 31474
True Temper Corp., 26159
Twinkle Undergarment Co., Inc., 50757
U.S. Pipe & Foundry, 12398
U.S. Plastic & Chemical Corp., 56957
U.S. Stamping Co., 34561
U.S. Steel Corp., 5905, 7729, 8205, 11285, 11286, 14774, 17074, 17087, 17088, 17557, 18798, 18799, 19479, 21083, 22106, 24633, 26160, 27930, 29377, 29378, 29379, 29856, 29857, 29858, 29859, 29860, 30372, 30934, 32893, 33846, 35130, 36704, 38133, 38134, 38140, 40080, 41311, 49078, 55488
U. S. Stove Co., 61050
Union Bridge Clothing Co., Inc., 27929
Union Carbide Corp., 12397, 12398, 18798, 19936, 19937, 32899, 37243, 44943, 47318
Union City Shoe Supplies, Inc., 4150
Union Electric Steel Corp., 14771
Union Metal Manufacturing Co., 33835
Union Railroad Co., 25500, 36714, 50762

Uniroyal, Inc., 9884, 26159, 53867, 59178
Uniroyal Tire Co., 27929
Unitech Chemical Co., 41310
United Merchants & Manufacturers, Inc., 49077
United Piece Dye Works, 7742
United Slipper Co., 53867
United Sportswear, 38133
Universal Ball Bearing Corp., 25205
Universal Coat Co., Inc., 39462
Universal Data Services, 55489
Universal Sportswear, 32900
University Clothing Corp., 33845
Upper Merion & Plymouth Railroad Co., 11286
Uptegraff Transformer Co., 47319
V.S.D. Clothing Co., 40081
Val Jon Corp., 50267
Valley Fashions, 8207
Valley Manufacturing Co., 47319, 47320, 47321
Valley Manufacturing Corp., 21084
Valley Nitrogen Producers, Inc., 50757
Valley Transportation & Warehouse Co., Inc., 37244
Van Houten Coat Co., 52562
Van Huffel Tube Corp., 27931
Vapor Lite Laboratories, 34561
Vatco Manufacturing Co., 11287
Venice Industries, Inc., 51880
Venus Coat Co., 47331
Verdi Fashion Co., Inc., 47801
Vernitron, Inc., 43586
Verona Manufacturing Co., 52563
Versailles Textile Print Corp., 49590
Vesuvius Crucible Co., 22099
Vi-Mil, Inc., 38646
Victor Gloves Manufacturing Corp., 43586
Victor Roberts, Inc., 38645
Victor United, Inc., 14772
Victor Wraps, Inc., 38645
Victoria Fashion, Inc., 50267
Victory Beef Co., Inc., 38134
Victory Optical Manufacturing Co., 53867
Vincent Bach Corp., 17087
Vincent's Formal & Leisure Wear, Inc., et al., 29380
Vinco Fashions, Inc., 41311
Viner Brothers Inc., 27932
Volco Brass & Copper Co., 61050
Vulcan Corp., 47321
Vulcan Mold & Iron, Inc., 1155
W & W Electronics, 47324
Wabash, Inc., 29860
Wakefield Engineering Inc., 19937
Wakefield Industries, Inc., 1155
Walker Broadway Associates, Inc., 14179
Wallace Diamond Drill Co., Inc., 36714
Walter Dyer Leather, 1561
Waterboro Patent Corp., 58653
Way Manufacturing Co., 50268
Wean United, Inc., et al., 1562, 12399, 25500, 47322
Weather Wise Raincoats Inc., 30935
Webster Enterprises, Inc., 24633
Webster Sportswear Corp., 47322
Weld, Inc., 30935, 55017
Welded Tube Co. of America, 7742
Well Made Pants Co., Inc., 5111
Wells Benrus Corp., 14772
Wells-Gardner Electronics Corp. et al., 14179
Wentworth Manufacturing Co., 1156
Werthan Industries, Inc., 47322
Wesley Textile Co., 32901
West New York Sportswear, 30373
West Point-Pepperell, Inc., 22106, 57691
Western Bearings Corp., 25206
Western Electric Co., 4151, 21084
Western Publishing Co., Inc., 49079
Westinghouse Electric Corp., 38135, 40575, 52558, 61050
Weyerhaeuser Co., 56958
Wheeling-Pittsburgh Steel Corp., 11287, 28588, 29380, 29381, 29861, 29862, 34561, 40081, 47323
Whitinsville Spinning Ring Co., 43587
Whitmo Handbags, Inc., 55490
Wide Awake Shirt Co., 18799
Wilbur B. Driver Co., 38135
Wilkes-Barre Apparel, Inc., 5111
Wilkinson Sword, Inc., 40082
Wilkoff Co., 49079
William Amer Co., Inc., 29382
William B. Pollock Co., 31472
William P. Goldman & Brothers, 47324
Willis & Paul Corp., 61051
Wilshire Knitting Mills, 7070
Wilson Sporting Goods Co., 36715
Wiman Corp., 57691, 57692
Winchester Hat Corp., 39462
Wingate Co., 57692
Winter Scene Fashions, Inc., 49591
Witteman Steel Mills, 18800
Wolff Shoe Manufacturing Co., 17089
Wollman Industries, Inc., 36715
Wonderalls, 59179
Woodbury Manufacturing Co., 39463
Wundies, Inc., 44943, 44944
Y & S Candies Inc., 21077
Yankee Maid Headwear, Inc., 8212
Young, Warren, 43586
Young Viewpoint Knits, Inc., 5112
Youngstown & Northern Railroad Co., 28587
Youngstown Sheet & Tube Co., 50268
Youngtimers, Inc., 28586
Youthful Foundations, Inc., 61051
Z-Pep Coats Corp., 12399
Zenith Radio Corp., 37244
Zuckerman Co., Inc., 9393

## LABOR MANAGEMENT RELATIONS OFFICE

### RULES

Urban mass transportation systems, financing; applications and certification of acceptable employee protective arrangements, 13558

## LABOR MANAGEMENT SERVICES ADMINISTRATION

*See also Pension and Welfare Benefit Programs Office.*

### PROPOSED RULES

Conduct standards:
Dismissal review, etc., 15735
Representation proceedings:
Petitions withdrawal, dismissal or deferral, etc., 15735
Unfair labor practices:
Complaint withdrawal or dismissal, etc., 15735

## LABOR STATISTICS BUREAU

### NOTICES

Meetings:
Business Research Advisory Council, 2458, 12391, 13646, 17545, 38122, 40069, 41304, 51468
Labor Research Advisory Council Committees, 15803, 47301
Occupational information; interagency agreements, 5348
Unemployment compensation programs; State:
Seasonally adjusted weekly unemployment rates; computation factors, 13646

## LAND MANAGEMENT BUREAU

### RULES

Alaska native claims; publication of initial selection applications; waiver of requirements, 17942
Financial assistance, local governments:
Mineral development impact relief loans, 57887
Grazing administration:
Alaska, livestock and reindeer, 29065
Exclusive of Alaska, 29067
Horses and burros, wild free-roaming; protection, management, and control; editorial changes, 29076
Land disposition:
Alaska native selections; application deadline extension, 11821
Alaska native selections; reservation of public easements, 55328, 57144, 57888
Land use permits, special; certain provisions removed, 7870, 11822, 38009
Oil and gas leasing:
Military or naval lands; exploration and development, 37202
Outer Continental Shelf; oil and gas leasing:
Bidders, qualified joint; extension of time, 32301, 58090
Environmental studies; guidelines and procedures, 3893
Issuance of leases; holding of high bids, 44531
Leasing program, 49983
Oil and gas information program; plans, lease sales, etc. of States affected, 3895
Public land orders:
Alaska, 3709, 26734, 31006, 59756
Arizona, 19045
Arkansas, 11992
California, 19231, 30277, 43718, 48640
Colorado, 29294, 29560, 50430
Idaho, 11992, 24063, 26734, 31138, 46850, 49983
Montana, 19046, 21461, 26446
Nevada, 19046
Oregon, 43304, 49794
Wyoming, 29294
Recreation management:
Recodification and revision of subchapter, 40734
Visitor use other than developed recreation sites, 7870, 11822
Trespass; editorial changes, 29076

### PROPOSED RULES

Financial assistance, local governments:
Mineral development impact relief loans, 49016
Geothermal resources leasing:
Competitive leases, 20826, 29811

Utilization of resources through licensing of power plant sites, 12266
Grazing administration:
Fee payments; meetings, 1108
Inventory and planning; procedures development; inquiry, 8814, 24559
Land disposition:
Alaska native selections; reservation of public easements, 22620
Omitted lands and unsurveyed islands; conveyance procedures, 51043
Mineral materials disposal:
Lode mining claims, unpatented, 29150
Minerals management:
Coal, 58776
Mining claims:
Location; recordation of unpatented claims and filing of assessment work information, 15102
Recreation management:
Off-road vehicles; use on public lands, 29412
Resource management plans, 58764
Rights-of-way:
Oil and natural gas pipelines; management and cost reimbursement, 8770
River areas; special recreational permits, allocations and transfers; advance notice, 57167
Technical services:
Cadastral survey; lands omitted from original survey, 51043

**NOTICES**

Aircraft; area closures:
Snake River Birds of Prey Natural Area and Study Area, Idaho, 26139
Airport leases:
Alaska, 2765, 26798, 31242, 50047
Arizona, 22453
Nevada, 22250, 38120
New Mexico, 40321
Wyoming, 26800
Alaska native selections; applications, etc.
Akhiok, Inc., 52529
Atkasook Corp., 4688
Atxam Corp., 56283
Belkofski Corp., 42818
Bethel Native Corp., 39183, 49057
Chaluka Corp., 37766
Chenega Corp., 60339
Chignik River Ltd., 2669
Choggiung Ltd., 22248
Chugach Natives, Inc., 3176
Cook Inlet Region, Inc., 28563
Doyon, Ltd., 6167, 7057
Eklutna, Inc., 3175, 3772, 60337
Eyak Native village, 27609
Kaguyak, Inc., 26618
Kaktovik Inupiat Corp., 4687
Karluk Native Corp., 8039
King Cove Corp., 26140, 29629
Koniag, Inc., et al., 11864, 14540
Kuugpik Corp., Inc., 3442, 4288
Meshik Inc., 9868, 12387
Natives of Kodiak, Inc., 16812
Ninilchik Natives Association, Inc., 14545, 17062
Northway Village, 28048, 28049, 28051
Nu-Nachk Pit, Inc., et al., 24609
Ounalaska Corp., 37765
Saguyak, Inc., 30360
Sealaska Corp., 4689
Seldovia Native Association, Inc., 14540, 14542, 17062
Shumagin Corp., 32464
St. George Tanaq Corp., 35552
Tanadgusix Corp., 35116, 38117
Tatitlek Corp., 40063, 44891, 56282, 57988
Tyonek Native Corp., Inc., 2766, 31438, 42820, 57990
Unga Corp., 26143
Yak-Tat Kwaan Inc., 19721, 19723
Applications, etc.:
Alaska, 18775, 21518, 48720, 49057
Arizona, 25489, 46081
California, 14134, 18047, 23657, 23658, 48083, 61019
Colorado, 1842, 3628, 5077, 6843, 13438, 14746, 15501, 15503, 16811, 17873, 18047, 19080, 20873, 21739, 22455, 24145, 25881, 25883, 30134, 30900, 30901, 31070, 31241, 32467, 33967, 35555, 36518, 37770, 39188, 39862, 39863, 42818, 42819, 45921, 45922, 49369, 49577, 52293, 53508, 53509, 54700, 54701, 55000, 57350, 60342
Florida, 28055
Idaho, 20280, 39610
Montana, 4290, 7271, 9654, 29628, 35555, 35751, 50744, 51849, 53830, 54700, 55001
Nevada, 33967
New Mexico, 1842, 1844, 1845, 2019, 2671, 2672, 3949, 4291, 5077, 5897, 5898, 5899, 5900, 6328, 6843, 7058, 7720, 8040, 8593, 8594, 8860, 9361, 10736, 11271, 11272, 11761, 12091, 12952, 13101, 13438, 13637, 14134, 14135, 16814, 16815, 18047, 19296, 19924, 20058, 20280, 21518, 21519, 21739, 22084, 22454, 22455, 23657, 24385, 25194, 25195, 25879, 25880, 26140, 27249, 27250, 28256, 28257, 28567, 28856, 29628, 30133, 30363, 31070, 31243, 31440, 31441, 33967, 34215, 34216, 34544, 35114, 35555, 36329, 36518, 36700, 37769, 37770, 38117, 38118, 38630, 38945, 39183, 41100, 41290, 41291, 42045, 42046, 43075, 43769, 43770, 44892, 45647, 46080, 46081, 47016, 47017, 47299, 47300, 47615, 47616, 47617, 48084, 48721, 48722, 50048, 50971, 50972, 51147, 51148, 52292, 52529, 53507, 53508, 53831, 54701, 55003, 55004, 56104, 57351, 57354, 57355, 57670, 58433, 59554, 61019, 61022
Texas, 27904
Utah, 13438, 15502, 24386, 30134, 30901, 35114, 35115, 52063, 52064, 56104
Wyoming, 1139, 1140, 1845, 3628, 3949, 3950, 4463, 4464, 4465, 5439, 5590, 5899, 6844, 8594, 8595, 9207, 9540, 9654, 9655, 9872, 10981, 12093, 12388, 12389, 13439, 13440, 13638, 14549, 15013, 15014, 15502, 15503, 16227, 16426, 16427, 16553, 16812, 17062, 17406, 18049, 19297, 19469, 20058, 20564, 21949, 22455, 22456, 24145, 24146, 24147, 24914, 25883, 26494, 27250, 28257, 28258, 28564, 28565, 28566, 29035, 29191, 29628, 29840, 31070, 31242, 32335, 32336, 32468, 32881, 33827, 33828, 34216, 34217, 35556, 35752, 37771, 38119, 38943, 38944, 38946, 39183, 39863, 40063, 40066, 41099, 41291, 43075, 43076, 43771, 43773, 44571, 44893, 46080, 46081, 46082, 46910, 47297, 47298, 48722, 50048, 50049, 50050, 50972, 51147, 51148, 51453, 52294, 53509, 54701, 54702, 55000, 55004, 55825, 56105, 58434, 59554, 61019, 61020
Authority delegations:
Alaska, ANCSA Program Management, Assistant to State Director, et al., 29360, 31440
Arizona Area Managers, Safford District, 31241
Arizona District Managers, 2019
Arizona State Office, Records and Data Management, Branch Chief, 6327
California State Office, Director, 6664
California State Office, Director; wilderness inventory, 52294
California State Office, Records and Data Management Branch Chief, 24914
Idaho State Fire Management Officer, Technical Services Division Chief, 44571
Lower Gila and Kingman Area Managers, Phoenix District, 4461
Nevada Area Managers, Elko District, 1010, 13638
Nevada District Managers, 10980, 16426
Nevada District Managers, Ely District, 12387
New Mexico State Office, Management Services Division, Title and Records Section Chief, 5897
New Mexico State Office, Records Section Chief, 42312
Oregon District Managers, 36005
State Directors et al.; lands and resources, 49058
Utah State Office, Cadastral Survey Branch Chief, 43392
Classification of lands:
Idaho; State grant, 29360
Coal areas:
Alabama, 58778
Coal leases:
Colorado, 2767, 36518, 37224, 43391, 54143
Kentucky, 31243
North Dakota, 38119, 46082
Utah, 39444, 42820, 53831
Coal management program, Federal; hearings and meetings, 59911
Committees; establishment, renewals, terminations, etc.:
National Advisory Council, 37014
Coral applications:
California, 23657, 23658
Florida, 28055, 35556
Environmental statements; availability, etc.:
Cerbat/Black Mountain Planning Units, Phoenix District, Ariz., livestock grazing program, 19984, 43392
Challis Grazing Unit, range management program, Idaho, 57197
Challis Planning Unit; livestock grazing, 40550, 45480
Coal leasing program, Federal, 9539, 33348
Coal management program, Federal, 58778
Coal regional statement, Colorado, 33347, 39441
Coal resources development, Colo., 57195
Coal resources development, Wyo., 14746, 18775, 25195, 40067, 48084, 50060, 50972, 55287, 58641
Coal resources on Federal lands; statement of policy and inquiry, 57662
Desolation-Gray River Management Plan, Utah, 47615
500 KV transmission line, Ariz. to Calif., 37232

Fort Mohave land sales, Nev., 36701
Hot Desert Utah; grazing management plan, 21950, 27615, 45480
Josephine Sustained Yield Unit, Oreg., 9540, 14364, 50060
Livestock grazing on public lands, 1980 through 1982 FYs, 47298
Natural Resource Land Management Act; correction, 39
North Valmy Coal-Fired Station, Nev., 21060, 50972
Organ Mountain Planning Unit, N. Mex., 30363
Outer Continental Shelf; California; oil and gas leasing, 38944
Outer Continental Shelf; Gulf of Mexico; oil and gas leasing, 4123, 27250, 31244, 43046
Outer Continental Shelf; Mid-Atlantic States; oil and gas leasing, 20563, 44893
Phosphate leasing; Osceola National Forest, Fla., 35556
Rio Puerco Resource Area, N. Mex., grazing management, 21382
San Luis Resource Area, Colo., grazing management, 21382
Sandy Area, Rock Springs District, Wyo., livestock grazing management, 21950, 45432
Seven Lakes Area, Wyo., grazing management, 31071
Silver City, Idaho; historic mining town, 56106
Silver City Project, Idaho, 17063
Star Lake-Bisti Region, N. Mex.; coal resource development, 45921, 50971
Tuledad-Home Camp areas, Calif. and Nev., livestock grazing, 20564, 45923
Uncompahgre Basin Resource Area, Grazing Management Program, Colo., 31071
Upper Gila-San Simon ES Area, Safford District, Ariz., livestock grazing, 17874, 45924
Vegetation control using herbicides; Western Oreg., 35397
Floodplain management; protection procedures, 44798, 52179, 54700
Geothermal resource areas; lease schedules, 40066
Grazing district boundaries:
Idaho, 27249, 28566
Wyoming, 27249, 28566
Horses and burros, wild free-roaming:
Adopt-a-Horse program; uniform marking procedure, 6842
Indian lands, jurisdiction transfer:
Cherokee Nation of Oklahoma, 18048, 22150
Land disposition:
Alaska native land easement procedures, 57990
Management framework plans; coal resources on Federal lands; statement of policy and inquiry, 57662
Management framework plans; review and supplement:
Casper District Office, Campbell and Converse MFPs, Wyo, 61022
Rawlins District Office, Hanna and Overland MFP, Wyo., 61022
Meetings:
Baker Resource Area Management Framework Plan and Roadless Area Inventory, Oreg., 53831
Battle Mountain District Grazing Advisory Board, 13923
Boise District Grazing Advisory Board, 19295, 36517
Burley District Grazing Advisory Board, 43074, 50048
Butte District Grazing Advisory Board, 61020
California Desert Conservation Area Advisory Committee, 2671, 13438, 14133, 26351, 37224, 48721, 50744
Canon City District Grazing Advisory Board, 14746, 30900, 48083
Carson City District Grazing Advisory Board, 29628
Casper District Grazing Advisory Board, 46081
Cedar City District Grazing Advisory Board, 13639, 36517, 57353
Craig District Grazing Advisory Board, 9872, 28856
Desolation and Gray River Management Plan, Utah, 53506
Elko District Grazing Advisory Board, 33827
Ely District Grazing Advisory Board, 52064
Grand Junction District Grazing Advisory Board, 13437, 28256, 50048
Interagency Geothermal Streamlining Task Force, 22247, 24914
Lewistown District Grazing Advisory Board, 51727
Moab District Grazing Advisory Board, 13101, 51148
Montrose District Grazing Advisory Board, 18343, 34215
Motor vehicles, off-road; management on public lands, 31243
Prineville District Grazing Advisory Board, 58433
Rawlins District Grazing Advisory Board, 19297, 25881, 32468
Riverside District Grazing Advisory Board, 34545
Rock Springs District Grazing Advisory Board, 21740, 29629, 61021
Roswell District Grazing Advisory Board, 24914
Safford District Grazing Advisory Board, 22085
Salmon District Grazing Advisory Board, 14747, 42820, 50048
Shoshone District Grazing Advisory Board, 15368, 35115
Socorro DIstrict Grazing Advisory Board, 61023
Utah, transmission and pipeline routes; wilderness aspects, 37494, 49856
Vale District Grazing Advisory Board, 9539
Vernal District Grazing Advisory Board, 61021
Wilderness program, 12762, 23766
Winnemucca District Grazing Advisory Board, 29629
Worland District Grazing Advisory Board, 15502, 25882, 36701, 48084
Motor vehicles, off-road, etc.; area closures:
California, 798, 4462, 6841, 30362, 54702
Idaho, 43772
Montana, 43567, 49370, 59444
New Mexico, 18047, 24385
Oregon, 33348, 36330
South Dakota, 25195
Motor vehicles, off-road; management on public lands; meeting, 31243
Opening of public lands:
Alaska, 50362
Colorado, 1138, 4462, 19725, 33966
Idaho, 26799
Montana, 59912
Nevada, 25880, 55001, 55002, 55003, 57353, 57354
New Mexico, 36700
Oregon, 4462, 9361, 57351
Utah, 1845, 8594, 26619
Wyoming, 6167, 59912
Organization and functions:
Fairbanks, Alaska, District Office; relocation, 25742
Outer Continental Shelf:
Dredging operations, South Atlantic area, 11868
Lease form, revision, 39441, 44893, 46586
Mineral and oil and gas leases, Alaska; protraction diagrams, availability, 18049
Mineral and oil and gas leases, Atlantic; protraction diagrams, availability, 29629
Oil and gas lease sales; Alaska, 60671
Oil and gas lease sales; Alaska; joint bidding ban waiver, hearing, 51452
Oil and gas lease sales; Alaska, protraction diagrams, availability, 3772, 14134, 22456, 25879, 41098
Oil and gas lease sales; Atlantic, 1845, 2768, 7373, 7721, 53832, 60237
Oil and gas lease sales; Atlantic; protraction diagrams, availability, 6167
Oil and gas lease sales; California; hearings, 42312
Oil and gas lease sales; Gulf of Mexico, 2009, 3175, 4123, 8190, 11605, 12389, 15501, 32874, 40933, 41292, 44571, 44896, 46081, 52531, 52534, 53063, 58873
Oil and gas lease sales; Gulf of Mexico, protraction diagrams, availability, 6167, 44896, 44900, 46586
Oil and gas lease sales; joint Federal-Alaska, 9871
Oil and gas lease sales; qualified joint bidders, list, 1548, 7720, 9873, 22457, 23658, 52529
Oil and gas lease sales; restricted joint bidders, list, 15500, 16427, 49856
Oil and gas leases, Pacific; protraction diagrams, availability, 5590, 32337
Oil and gas leasing, bidding system and royalty rates, 5900
Recreation management restrictions, etc:
Fort Meade Recreation Area, Sturgis, S. Dak., 34545
Rogue National Wild and Scenic River, Oreg., 12091
Recreation site designation:
Grimes Point, Nev., 8593, 11868
Research natural area designation:
Aden Lava Flow, N. Mex., 22455, 51148
Roadless area reports; availability, 9539
Sale of public lands:
Nevada, 52292, 56286
Survey plat filings:
Alaska, 24385, 44891, 44892, 51146, 59553
Arizona, 31069, 50047
California, 13639, 34543, 47296, 47297, 49576
Florida, 50509

Idaho, 4462, 12387
Minnesota, 41099, 47015, 47016
Nevada, 6328, 36518
Utah, 9361, 48084
Washington, 29035, 52063
Wisconsin, 38631
Timber sales, small business share recomputation guidelines, Oreg., 31242
Wetland-riparian area protection and management; policy and protection procedures; interim guidelines, 44798, 52179, 54700
Wilderness area inventories:
Arizona, 59554
California, 41290, 47297, 56104, 57196
Colorado, 56105
Idaho, 52291, 61021, 61022
Montana, 56103
Oregon, 52529, 54302
Utah, 49856
Washington, 52529
Wyoming, 53509
Wilderness aspects; Utah, transmission and pipeline routes, 37494, 53509, 61022
Wilderness policy and review procedure:
Inventory Handbook; availability, 43772
Meetings, 12762, 23766
Withdrawal and reservation of lands, proposed, etc.:
Alaska, 1840, 1841, 4461, 18046, 31241, 35751, 37768
Arizona, 2766, 4690, 5077, 15501, 29630, 33827, 50047
California, 2767, 2768, 6842, 9538, 14135, 14745, 15502, 17543, 19295, 19296, 22454, 23656, 32881, 48720, 48721, 57353
Colorado, 1011, 1012, 3175, 9361, 12090, 13437, 19469, 19725, 19726, 25878, 26798, 33966, 35397, 37013, 37768, 37769
Idaho, 1139, 4462, 10980, 26799, 28256
Michigan, 14548
Montana, 2767, 5897, 46080, 49369
Nevada, 20281, 24145, 43771
New Mexico, 1843, 9655, 13102, 37225, 40320, 43075, 43772, 44571, 53063, 53508, 58232
Ohio, 51727
Oregon, 12388, 38945
Utah, 34545, 53063, 55001
Washington, 3316, 5590, 28857
Wyoming, 40066

## LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

### RULES

Nondiscrimination:
Crime control and juvenile delinquency programs, federally-assisted, 28796
Research and statistical information; confidentiality, 16974

### NOTICES

Appeal from grant application denial, termination, etc.:
Champaign County, Ill.; hearing, 22087
Connecticut restitution service, 38633
Dallas; nondiscrimination compliance, 36007
Georgia Department of Offender Rehabilitation; hearing, 33350
Hartford, Conn.; hearings, 53511
Illinois Department of Corrections:hearings, 48725
Committees; establishment, renewals, terminations, etc.:
Criminal Justice National Minority Advisory Council, 59914
Law Enforcement and Criminal Justice National Institute Advisory Committee, 29632
Criminal intelligence systems operating policies, 5440, 28572
Criminal Justice Education and Training Office; guidelines for commentary internship program, 40939
Discretionary grant programs guide, 1979 FY, 32612, 51467
Grant applications, consolidated; submission by insular areas, 58233
Grant applications, reporting requirements, 13645
Grants solicitation, competitive research:
Addicted prisoners in Conn., Md., and Wash., treatment and rehabilitation, 15204
Adult restitution programs, 15203
Anti-fencing program, 30903
Citizens reporting to police, 16818
Criminal case dismissals, 11873
Criminal courts, fairness and efficiency, 60242
Criminal justice action programs, evaluations, 56736
Criminal justice agencies, public; internship program, 43078
Criminal sentencing practices, 11873
Discrimination against women in criminal justice administration, 52788
Environmental attributes relating to informal social control mechanisms and crime prevention, 16817
Graduate research fellowship program competition, 25884
Integrated criminal apprehension program, 15203
Knowledge utilization process in criminal justice, 56107
Mental health information, 12391
Model pre-release program, 14550, 15204, 32196
National school resource center and network, 28058, 38788
Neighborhood decline and abandonment, 16227
Nonterrorist collective disorders, 22462
Patrol operations management, 21745, 29841
Police command and control systems, 15204
Police community relations, 17412
Police management practices, 20063
Police operational decision-making, 16818
Research and evaluation methodology development, 59555
Sentencing guidelines, New Jersey, 17412
Theory of general deterrence program, 7273
Undercover business-front fencing operations, 21065
White collar crime data sources, 22087
Incentive fund programs; inquiry, 37964
Interjurisdictional Intelligence Systems, annual notice, 36149
Juvenile justice and delinquency prevention grants; guideline revision, 12650, 36402
Juvenile justice and delinquency prevention programs; funding, 47794
Juvenile offenders restitution; program guidelines, 10643
Law Enforcement and Criminal Justice Institute; program plan, 1979 FY, 48725
Law Enforcement and Criminal Justice Institute; unsolicited research program, 1978 FY, 4127
Law enforcement education program applications; availability, 58874
Meetings:
Carbon monoxide and heart disease, relative contribution to death of public safety officers, 41302
Criminal Justice National Minority Advisory Council, 21746, 38952, 41302
Juvenile Justice and Delinquency Prevention National Advisory Committee, 3183, 28571, 33967, 53068
National Institute of Law Enforcement and Criminal Justice Advisory Committee, 20282, 46086
Needs assessment:
National Minority Advisory Council on Criminal Justice; hearing, 17545, 34547
State Planning Agency Grants; guidelines manual, inquiry, 48086

## LEGAL SERVICES CORPORATION

### RULES

Criminal proceedings; legal assistance restrictions, 32775
Eligibility, legal assistance; maximum income levels, 27534, 32414, 32415
Fee-generating cases, 51789
Financial assistance:
Procedures governing suspension, 21883
Procedures governing termination and denial of refunding, 32770
Governing bodies, 32772
Information disclosure, 51785
Juveniles, legal assistance; CFR Part removed, 32416
Political activities, prohibited, 32773
Resources allocation priorities, 51789
Restricted activities; lobbying, etc., 32774
Sunshine Act; implementation, 11198

### PROPOSED RULES

By-laws, Sunshine Act implementation, 4269
Criminal representation, 11242
Eligibility, determination, 21905
Fee-generating cases, referral restriction, 33764
Financial assistance:
Procedures governing suspension, 19
Procedures governing termination and denial of refunding, 16
Freedom of information, 32827
Governing bodies of recipients:
Membership requirements, 21904
Juvenile representation, 11242
Lobbying activities prohibited and enforcement, 11241
Political activities of employees, 11241
Program priorities, 11242
Resources allocation priorities, 32831
Sunshine Act; implementation, 1807, 4269

### NOTICES

Expansion into areas previously unserved by LSC-funded program; interim internal staff directive, 52301
Grants and contracts; applications, 800, 801, 1410, 2462, 2463, 3444, 6176, 6177, 6343, 6344, 6847, 8307, 10450, 10451, 10748, 10983, 12763, 12969, 15207, 15372, 16432,

26351, 26804, 28866, 30936, 37015, 44944, 47617, 50510, 52789
Meetings:
Appropriations and Audit Committee, 7747, 13441
Board of Directors, 7071
Legal Services Provision Committee, 7071
Personnel and Facilities Committee, 13441
Personnel Committee, 3183
Regulations Committee, 3183, 13441
Meetings; Sunshine Act, 18400, 20893, 24954, 25529, 29247, 41160, 41335, 42853, 43410, 47811, 52358, 52359, 55312
Nondiscrimination, handicapped, 13927

## LIBRARIES AND INFORMATION SCIENCE, NATIONAL COMMISSION

RULES
Privacy Act; implementation, 47195
PROPOSED RULES
Privacy Act; implementation, 34805
NOTICES
Meetings:
School Library Media Program in Networking, Role of, Task Force, 7273
Meetings; Sunshine Act, 4316, 4914, 16882, 37536, 54175, 59970
Privacy Act; systems of records, 47332
Privacy Act; systems of records; annual publication, 35805

## LIBRARY AND INFORMATION SERVICES, WHITE HOUSE CONFERENCE

NOTICES
Meetings; Sunshine Act, 16884, 61083

## LIBRARY OF CONGRESS

*See also Copyright Office, Library of Congress. Copyrighted Works, New Technological Uses National Commission.*

NOTICES
Meetings:
American Folklife Center Board of Trustees, 18800, 49591

## MANAGEMENT AND BUDGET OFFICE

*See also Federal Procurement Policy Office.*

NOTICES
Budget rescissions and deferrals, 2156, 4392, 6750, 7383, 8500, 11130, 11132, 16276, 21284, 21628, 25310, 25968, 30774, 32274, 36008, 40941, 45970, 46930, 47704, 53694, 57228, 58318, 58344, 59044
Clean Water Act, data collection; hearing, 18076
Clearance of reports; list of requests, 1019, 2959, 2960, 3448, 4152, 4294, 5120, 6178, 6179, 7276, 7492, 7748, 8308, 8602, 9396, 10452, 10991, 11293, 11622, 11776, 12136, 13118, 13119, 13444, 13445, 14182, 14556, 16436, 16437, 16824, 17419, 17559, 17888, 18366, 18617, 19729, 19730, 21524, 21959, 21960, 24392, 24393, 24639, 24920, 25891, 26163, 26351, 27266, 27936, 28266, 28869, 28870, 29044, 29386, 30632, 30939, 31251, 31475, 32204, 32339, 32340, 32906, 32907, 33848, 34224, 34568, 36725, 37019, 37248, 38141, 38477, 38648, 38963, 38964, 39614, 39875, 40084, 40581, 41104, 42051, 42052, 42829, 43079, 43401, 43775, 43776, 44578, 44945, 45930, 46390, 47335, 47336, 49375, 49376, 49595, 50065, 50511, 50976, 51153, 51482, 51884, 52072, 53517, 53872, 54149, 54707, 54708, 55024, 55829, 56736, 56737, 57205, 57360, 57697, 57993, 58127, 58436, 58663, 58875, 59451, 59452, 59560, 60358, 61059
Committees; establishment, renewals, terminations, etc.:
President's Federal Statistical System Reorganization Project Advisory Committee, 27620
Federal assistance programs study plan, 27504
Federal Grant and Cooperative Agreement Act of 1977; implementation guidance, 21832, 36860
Federal operations and programs, audit (A-73 Revised), 12404
Grants, contracts, and agreements with educational institutions; cost principles (A-21 Revised); inquiry, 9896, 17419
Grants, contracts, and agreements with State and local governments, cost principles (A-87), 50977
Grants-in-aid to State and local governments; uniform administrative requirements (A-102):
Exemptions, 56115
Inquiry, 48090
Improving Government regulations, 21997, 24219
Information, scientific and technical; dissemination; inquiry, 32204
Joint funding evaluation (A-111); inquiry, 52310
Meetings:
Statistical System Reorganization Project, President's Advisory Committee, 38748, 52071
Privacy Act; guidance for matching programs; inquiry, 34724
Privacy Act; systems of records, 2466, 9907, 11292, 14556, 15377, 20064, 22468, 25751, 26624, 27620, 33972, 39615, 41320, 44579, 52071, 56738
Reorganization project, President's:
Natural resources and environmental functions; inquiry; correction, 11622
Natural resources and environmental functions; inquiry; extension of time, 2467
Statistical standards; responsibility transfer to Commerce Department (OMB Circulars A-39, A-46, A-65, and A-91 discontinued), 19308
Urban and community impact analysis; agency procedures (A-116), 37779
Voluntary consensus standards-developing bodies, Federal interaction; proposed circular; inquiry, 48, 7383

## MANPOWER ADMINISTRATION

*See also Employment and Training Administration.*

NOTICES
Meetings, 47802

## MANPOWER POLICY, NATIONAL COMMISSION

NOTICES
Meetings, 1563, 2463, 7379, 13649, 15504, 29043, 35761, 41312, 41313, 43590, 55018

## MARINE MAMMAL COMMISSION

NOTICES
Meetings:
Marine Mammals Scientific Advisors Committee, 5441, 35405
Privacy Act; systems of records; annual publication, 36524

## MARITIME ADMINISTRATION

RULES
Capital Construction Fund; addition of repurchase agreements to list of permissible investments, 51636
Merchant marine training:
Admission and training of midshipmen; pay allowances, 56663
State maritime academies and colleges; financial assistance limits and conditions, 9
Seamen's service awards; additional service provision and service ribbons price change, 1943
Statements, reports, and agreements; rescission of vessel utilization and performance report filing requirement, 22981
Subsidized vessels and operators:
Bulk cargo vessels engaged in worldwide services; operating differential subsidy; nonsubsidized service, 4858
Financial aid and subsidy applications; construction-differential subsidy for machinery and electric plant spare parts, 1622
Liner operators, operating-differential subsidy; limitations on awards and payments; extension of time, 8, 4260
Vessel financing assistance:
Obligation guarantees, 60912
War risk insurance; eligibility, 54091
PROPOSED RULES
Port controllers, Federal, 28819
Port facilities; restrictions upon transfer or change in use or terms governing utilization, 28818
Subsidized vessels and operators:
Conservative dividend policy; declarations standards, 1363, 4269
Construction-differential subsidy repayment; total repayment policy, 51045
Standard contract forms; construction-differential subsidy, 57624
Terminal operating contract, 28821
War risk insurance; vessel and owner eligibility, 24075
NOTICES
Applications, etc.:
Aeron Marine Shipping Co. et al., 30593
Alaska National Bank of the North, 35521
American Export Lines, Inc., 9514
American President Lines, ltd., 30089, 35983
Apollo Marine Co. et al., 23751, 25708
Atlas Marine Co. et al., 19429
Boston VLCC Tankers, Inc., et al., 4449, 16363

Chas. Kurz & Co., Inc., 39407, 49346
Chestnut Shipping Co., 5558
Cove Carriers, Inc. et al., 47601, 50954, 52275, 58606
Cove Trading Inc., 3147, 4448
Cove Ventures Inc. et al., 21713, 24114, 26603
CTS Associates, 49829
Delta Steamship Lines, Inc., 16534, 17023, 19060
Farrell Lines, Inc., 23751, 24723, 24724
Fillmore Tanker Corp., 54679
Great Lakes-Atlantic Steamship Co., 43757, 55435
Gulf Oil Corp., 4669
Lykes Bros. Steamship Co., Inc., 1116, 3926, 10614, 13600, 24724, 58848
Manhattan Tankers Co., Inc., et al., 58606
Ship Development Mobilization conference, 43757
States Steamship Co., 1116, 4083, 4449
Sun Transport, Inc., 4448, 7995
Suwannee River Finance, Inc., et al., 17856, 23752, 31961, 42025, 43057
Texas Commerce Bank National Association, 21713
Waterman Steamship Corp., 4083, 11844
Zapata Products Tankers, Inc., 25457
Bid invitations:
SS United States, 17022
Capital construction fund:
Interest rates on nonqualified withdrawals, 59537
Construction-differential subsidy; Sealift Readiness program participation requirements, 42025
Environmental statements; availability, etc.:
Bulk liquid tank vessels used in domestic trade, 30850
Tanker construction and bulk chemical carrier construction programs, 20530
Foreign construction cost computations:
Cargo vessels, MA design C4-a-lu, 20835
Containerships, MA design C5-S-75c, 56256
Containerships, MA design C9-S-132a, 30850
Dry bulk carriers, MA design C5-M-129a, 17022
Roll-on-roll-off containerships, MA design C7-S-131a, 20835
Superphosphoric acid tug barge vessels, 17022
Improving Government regulations, 23183
Insurance rates, Great Lakes and St. Lawrence Seaway; inquiry, 4876
Meetings:
Ship development mobilization; conference, 43757
U.S. Merchant Marine Academy Advisory Board, 12901, 38613, 58848
Operating-differential subsidy; Sealift Readiness program participation requirements, 42025
Operating-differential subsidy agreements:
Farrell Lines Inc., 51826
Operating-differential subsidy procedures manual; amendments, 2750, 47993

## MATERIALS TRANSPORTATION BUREAU

*See also Hazardous Materials Regulation Office. Pipeline Safety Regulation Office. Research and Special Programs Administration.*

RULES
Hazardous materials regulations; editorial amendments, 48642

## MENTAL HEALTH, PRESIDENT'S COMMISSION

NOTICES
Meetings, 4700, 7277, 8877, 10992
Termination, 23059

## METRIC BOARD

PROPOSED RULES
Sunshine Act; implementation, 41230

NOTICES
Meetings; Sunshine Act, 18831, 19755, 23843, 34575, 47651, 57222

## MEXICO AND UNITED STATES, INTERNATIONAL BOUNDARY AND WATER COMMISSION

RULES
Privacy Act; implementation, 47182

NOTICES
Environmental statements; availability, etc.:
Rio Grande Canalization Project, 44572
Floodplain management and wetlands protection; procedures, 30494, 61023
Privacy Act; systems of records; annual publication, 45959

## MINE SAFETY AND HEALTH ADMINISTRATION

RULES
Civil penalties for violations, 23517
Coal mine health and safety:
Legal identity notification; CFR Part revoked, 29513
Noise dosimeters, 40761, 50678
Representatives of miners; CFR Part revoked, 29510
Underground mines; filter-type and self-contained self-rescuers use, 54246, 56894
Underground mines; illumination standards; effective date deferred, 13563
Establishment of CFR Chapter, transfer of MESA regulations, and nomenclature changes, 12312, 43458
Filing and other administrative requirements:
Hazardous conditions complaints, processing procedures, 29515
Legal identify notification, 29512, 39988, 51761
Mandatory safety standards modification petitions; practice rules, 29518, 35687
Representation of miners, 29509
Health and safety training of miners, 47459
Metal and nonmetallic mine safety:
Open pit mines, etc.; variances; CFR sections revoked, 29518
Potable water, silica dust, asbestos dust, toxic substances, etc., 54064

PROPOSED RULES
Civil penalties for violations, 9120, 14691
Coal mine health and safety:
Miners with pneumoconiosis, transfer procedures; respirable dust; hearing, 26454, 29339
State grants; procedures and requirements for applying for, receiving and administrering, 53774
Surface mines and work areas; respirable dust; hearing, 26454, 29339
Underground mines; respirable dust; hearing, 26454, 29339
Contractors, independent; mine services and construction; advance notice, 50716
Filing and other administrative requirements:
Hazardous conditions complaints, processing procedures; extension of time, 14691
Legal identity notification; extension of time, 14691
Representative of miners; extension of time, 14691
Safety standards, mandatory, petitions for modification; practice rules; extension of time, 14691
Health and safety training of miners, 30990, 34508
Metal and nonmetallic mine safety:
Open pit mines; health and safety standards, 40766, 43475, 47213
Sand, gravel and crushed stone; health and safety standards, 40766, 43475, 47213
Underground mines; health and safety standards, 40766, 43475, 47213
Respiratory protective devices:
Respirable dust; definition; hearing, 26454, 29339
Self-contained breathing apparatus, 47212
Safety standards, mandatory; underground coal mines:
Self-rescuers, use of filter type and self-contained; hearing, 18710

NOTICES
Meetings:
Advisory Metal and Nonmetallic Mine Health and Safety Standards, Review Advisory Committee, 15805, 19477, 21747
Mine Health and Safety Training Program Regulations Review Advisory Committee, 15204
Meetings; Sunshine Act, 17627
Mine safety and health:
Interpretative bulletins, 17546
Petitions for mandatory safety standard modification:
Albion Vein Slate Co., Inc., 21747, 59925
American Coal Co., 61035
American Gilsonite Co., 54304
Angus Mining Co., 21068
Anthony Dally & Sons, Inc., 24148, 59926
Bethlehem Mines Corp., 55473
Big Ben Coal Co., 15805
Braztah Corp., 49580, 58124
Brown Badgett Coal Co., Inc., 55008
Burnrite Coal Co., 30370, 59921
Burnside Mining Co., 19928
Cities Service Co., 49580
Climax Molybdenum Co., 58124
Clines, Inc., 26497
Consolidation Coal Co., 49059, 54305, 55474
Council of Southern Mountains, Inc., 30370
DD&R Coal Co., 26146
D & R Mining Corp., 30370
Delano Granite, Inc., 46588
Demar Boren, 54305
Eastern Associated Coal Co., 51862, 56292
Eastern Associated Coal Corp., 19928
Eastover Mining Co., 49581
Emerald Slate Corp., 26146, 59921

Extractors, Inc., 17065
Flat Top Colliery Corp., 28577
Fletcher, H. E., Co., 46589
Fort Dodge Corp., 50272
Frailey Coal Co., 30921
Frontier Spar Corp., 52552
Garden Creek Pocahontas Co., 56951
Gateway Coal Co., 49581
Gulf & Western Industries, Inc., 28577
H & S Coal Co., 15805
Harbison-Walker Refractories, 51862
Hecla Mining Co., 19929, 24148, 59922
Hi Top Coal Co., Inc., 21747
Highwall Coal Co., 59922
Hitchcock Corp., 49582
Homestake Mining Co., 24148, 59926
Idarado Mining Co., 47795
International Salt Co., 46589
Jessie S. Morie & Son, Inc., 47795
K.L.M. Coal Co., 49582
KWY Coal Co, 19929
Ligon Preparation Co., 24149
M & M Coal Co., 51469
M.S.W. Coal Co., 45654
Marrowbone Development Co., 55475
McKee Quarries Co., Inc., 46589
Morata Coal Co., 61036
Morris Coal, Inc., 49582
Mullins & Sons Coal Co., 61036
National Gypsum Co., 22792, 59923
National Mines Corp., 24149, 35759
New Jersey Zinc Co., 47795
North Mt. Coal Co., 19929
Olga Coal Co., 18354
Orchard Coal Co., 59923
P. S. & R. Coal Co., 26147
Page Fork Coal Co., Inc., 59924
Peabody Coal Co., 22793, 49060
Penn Big Bed Slate Co., Inc., 24149, 59927
Pickands Mather & Co., 51863, 54305
Pontiki Coal Corp., 28577
Portland-Monson Slate Co., 55475, 56292
Pyro Mining Co., 59924
Quarto Mining Co., 61037
Rio Algom Corp., 55475
Rio Blanco Oil Shale Co., 29042, 55475
S & M Coal Co., 17066
Sewell Coal Co., 46589
Shally Coal Co., 49583
Slab Fork Coal Co., 59924
Smith & Stover Coal Co., 15806
Solar Fuel Co., 34450
Standard Metals Corp., 24150
Stauffer Chemical Co., 34450, 59925
Stearns Mining Co., 17065
T & M Coal Corp., 49583
U.S. Steel Corp., 29042, 49584, 51469
Union Carbide Corp., 49583, 55009
United Pocahontas Coal Co., 55476
Valley Camp Coal Co., 50272, 50273
Valley Mining Co., Inc., 35759
Wave Mining Co., 46590
Westmoreland Coal Co., 49584
Woods Fuel Coal Co., 55009

## MINE SAFETY AND HEALTH FEDERAL REVIEW COMMISSION

**RULES**

Procedural rules; interim, 10320
Procedural rules; interim; appeals, 19660, 46531

**PROPOSED RULES**

Procedural rules, 50712, 53045, 56682, 57923, 58097
Sunshine Act, implementation, 53470

**NOTICES**

Meetings; Sunshine Act, 43814, 47077, 49108, 49411, 50282, 50539, 50799, 51197, 51504, 51750, 52602, 53568, 55056, 56757, 58143, 58897, 60367

## MINERALS, MINING

*See Hearings and Appeals Office, Interior Department.*
*Land Management Bureau.*
*Mine Safety and Health Administration.*
*Mine Safety and Health Federal Review Commission.*
*Mines Bureau.*
*Mining Enforcement and Safety Administration.*
*Surface Mining Reclamation and Enforcement Office.*

## MINES BUREAU

**RULES**

Coal analysis for non-Federal applicants; transfer of functions to Energy Department, 35477, 43459

**NOTICES**

Metals and minerals, statistical information; revised table on pre-publication release; minerals data availability, 37226

## MINIMUM WAGE STUDY COMMISSION

**NOTICES**

Meetings, 25501, 26161, 31474, 35561, 43397, 51149, 59932

## MINING ENFORCEMENT AND SAFETY ADMINISTRATION

**RULES**

Accidents, injuries, illnesses, employment, and production; notification, investigation, reports, and records; correction, 1617
Regulations transferred to Mine Safety and Health Administration, 12312

**PROPOSED RULES**

Coal mine health and safety:
Civil penalties for violations, 9121
Legal identity notification; CFR Part removed, 9111
Miners with pneumoconiosis, transfer procedures; respirable dust; extenstion of time, 979
Noise standards; integrating sound level meters (dosimeters) use; hearing results, 3729
Representative of miners; CFR Part removed, 9108
Surface mines and work areas; respirable dust; extension of time, 979
Underground mines; respirable dust; extension of time, 979
Respiratory protective devices; permissibility tests:
Respirable dust; definition; extension of time, 979

## MINORITY BUSINESS ENTERPRISES OFFICE

**NOTICES**

Improving Government regulations, 23191

## MISSISSIPPI RIVER COMMISSION

**NOTICES**

Meetings; Sunshine Act, 7084, 19498, 34575, 45943

## MOTOR VEHICLES

*See Environmental Protection Agency.*
*Federal Highway Administration.*
*General Services Administration.*
*Interstate Commerce Commission.*
*National Highway Traffic Safety Administration.*
*Urban Mass Transportation Administration.*

## MUSEUM SERVICES INSTITUTE

**RULES**

Museum services program, 45167, 54933, 58376

**PROPOSED RULES**

Museum services program, 13012

**NOTICES**

Grant applications and proposals, closing dates:
Museum services program, 14744, 17404
Meetings:
National Museum Services Board, 51144

## NATIONAL ADVISORY COMMITTEE FOR WOMEN

*See Women, National Advisory Committee.*

## NATIONAL ADVISORY COMMITTEE ON OCEANS AND ATMOSPHERE

*See Oceans and Atmosphere, National Advisory Committee.*

## NATIONAL ADVISORY COUNCIL ON ECONOMIC OPPORTUNITY

*See Economic Opportunity, National Advisory Council.*

## NATIONAL ADVISORY COUNCIL ON INDIAN EDUCATION

*See Indian Education National Advisory Council.*

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**RULES**

Administrative authority and policy:
Inspection, persons and personal effects on NASA property, 14008
Patents, 34122
Boards and committees:
Contract Adjustment Board, 50674
Congressional Space Medal of Honor; nomination procedures, 15624
Inventions and contributions:
Awards to NASA employees and contractor employees for reported scientific and technical contributions, 7309
Inventions and Contributions Board, 29105

NASA and Aerospace related employment reporting procedures; editorial changes, 52215
Organization and functions:
Editorial changes, 29556
Patents; waiver regulations; correction, 3088
Patents and other intellectual property rights, authority delegations, 34122
Procurement; availability, 40019
Space science flight investigations; policy concerning data obtained, 18646
Space transportation system:
Payload specialists for NASA or NASA-related payloads, 9790
Personal preference kit; authorized articles, 49979
Wind tunnels, NASA; development work for industry, 45823

PROPOSED RULES

Environmental quality:
Floodplain and wetlands management, 25317
Space medal of honor; nomination procedures, 8267
Space transportation system:
Personal preference kit; authorized articles, 25693
Wind tunnels, NASA; development work for industry, 21691

NOTICES

Advisory committee review; inquiry, 9661
Aerospace contractors, direct awards of $10 million or more, list, 57992
Certification; appearance before NASA:
Craddock, Wade L., Jr., 49080
Golden, Dr. Robert L., 49080
Committees; establishment, renewals, terminations, etc.:
Applications Steering Committee, 29192
Lunar Sample Analysis Advisory Committee, 51149
Space Science Steering Committee, 16818, 40576
Wage Committee, 47332
Environmental statements; availability, etc.:
Michoud Assembly Facility, New Orleans, La., 6177
Space shuttle program, 20877
Improving Government regulations, 21981, 45481, 55491
Meetings:
Advisory committees, closed meetings; reports, availability, 60675
Aeronautics Advisory Committee, 12131, 28866, 30936, 47332, 52565, 54307, 59181
Aerospace Safety Advisory Panel, 4698, 50511
Applications Steering Committee, 29382, 32901, 33968, 49591
Historical Advisory Committee, 60676
Life Sciences Advisory Committee, 3781, 22795, 30145
Lunar Sample Analysis Advisory Committee, 52065, 54146
NASA Advisory Council, 15019, 32901, 32902, 45481, 49371, 49592, 50510, 52565, 53068, 53069, 54307, 55017, 60675
Space and Terrestrial Applications Advisory Committee, 26620, 28866, 28867, 29382
Space Science Advisory Committee, 22107
Space Science Steering Committee, 19939
Space Systems and Technology Advisory Committee, 27617, 31245
Stratospheric Research Advisory Committee, 16818
Wage Committee, 22107
Patent licenses, exclusive:
Griswold Co., 25208
Licensing Management Corp., 25209
Transolar, Inc., 47331
Whitcomb, Dr. Richard T., 3781
Patent licenses, foreign exclusive:
Japan Engineering Development Co., 3780, 12768, 20568, 34846
Sartorius GmbH, 48087
Privacy Act; systems of records; annual publication, 38515
Regulatory agenda; semiannual publication, 45481

## NATIONAL ARCHIVES AND RECORDS SERVICE

*See also Federal Register Office.*

RULES

Property management:
Disposition of Federal records; vital records during emergency, 43461
National Historical Publications and Records Commission; grant procedures, 14316
Records management; centralized audiovisual services, 33892
Records management; microfilming; film processing, 4998
Reproduction services, fees, 58569
Researchers; conduct standards, 1798

PROPOSED RULES

Property management:
Records management; micrographics management, 12731, 14975
Reproduction services; fees, 47981

NOTICES

Advisory committees, Federal, index to membership; availability, 14180
Advisory committees, 1977 annual report of President; availability on microfilm, 14180, 19940
Meetings:
Archives Advisory Council, 50247
Records equipment and supplies; new Federal stationery size standard, 57348
Stationery, Federal; new size standard, 57348

## NATIONAL BUREAU OF STANDARDS

NOTICES

Footwear industry, domestic; technology symposium, 20028
Improving Government regulations, 23193
Information processing standards, Federal:
COBOL; interpretations, 6294, 53787, 53789, 55273, 55435
COBOL compiler validation, 3300
I/O channel level interface, 26341, 27577, 28849, 33286
User-terminal protocols; entry and exit procedures between terminal users and computer services; inquiry, extension of time, 13601
Meetings:
Building Technology Advisory Committee, 7472, 23008, 25355, 35374, 38892
Footwear industry, domestic; technology symposium, 20028
International Legal Metrology Advisory Committee, 15471
Visiting Committee, 5559, 21925, 29345, 59866
Voluntary product standards:
Bedding products and components (mattresses, foundations, beds, bed frames, and headboards), 55813
Coarse aggregates for highway construction; crushed stone, gravel, slag; simplified practice recommendation R 163-48; withdrawn, 30090, 46361
Gummed Kraft paper sealing tape; simplified practice recommendation R 114-63; proposed withdrawal, 60182
Hosiery; men's, women's and children's; body measurements for sizing, 49347
Iron and steel roofing, siding, and ridge roll; proposed withdrawal, 29345, 41073
Metal lath (expanded and sheet) and metal plastering accessories, simplified practice recommendation R 3-60; withdrawal intent, 56255
One-way concrete joist construction, types and sizes of forms, PS 16-69; withdrawal, 55812
Plumbing fixtures, porcelain enameled formed steel; withdrawn, 13600, 23009
Poly (vinylidene fluoride) (PVF2) plastic lined steel pipe and fittings; voluntary product standard (PS 35-70; withdrawn, 50236, 57938
TFE-fluorocarbon (polytetrafluoroethylene) resin skived tape, product standard PS 3-66; withdrawn, 40050, 56255
TFE-fluorocarbon resin flexible hose, commercial standard CS 247-62; withdrawn, 21496, 34518
TFE-fluorocarbon resin sheet, commercial standard CS 239-63; withdrawn, 9330, 21496
Thermal conductance factors for performed above-deck roof insulation, simplified practice recommendation R-257-55; withdrawn, 21497, 34518
Vinyl-coated glass fiber insect screening and louver cloth, commercial standard CS 248-64, 59866

## NATIONAL CAPITAL HOUSING AUTHORITY

RULES

Obsolete CFR Chapter deleted, 8505

## NATIONAL CAPITAL PLANNING COMMISSION

NOTICES

Authority delegations:
Chairman et al., 20878
Improving government regulations, 20945, 59181

## NATIONAL CENTER FOR EDUCATIONAL STATISTICS

*See Educational Statistics, National Center.*

## NATIONAL COMMISSION FOR MANPOWER POLICY

*See Manpower Policy, National Commission.*

## NATIONAL COMMISSION FOR REVIEW OF ANTITRUST LAWS AND PROCEDURES

*See Antitrust Laws and Procedures, National Commission for Review.*

## NATIONAL COMMISSION ON ELECTRONIC FUND TRANSFERS

*See Electronic Fund Transfers, National Commission.*

## NATIONAL COMMISSION ON EMPLOYMENT AND UNEMPLOYMENT STATISTICS

*See Employment and Unemployment Statistics, National Commission.*

## NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE

*See Libraries and Information Science, National Commission.*

## NATIONAL COMMISSION ON NEIGHBORHOODS

*See Neighborhoods National Commission.*

## NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

*See Copyrighted Works, New Technological Uses National Commission.*

## NATIONAL COMMISSION ON THE INTERNATIONAL YEAR OF THE CHILD, 1979

*See Child, International Year of the, 1979, National Commission.*

## NATIONAL COMMISSION ON UNEMPLOYMENT COMPENSATION

*See Unemployment Compensation, National Commission.*

## NATIONAL COMMUNICATIONS SYSTEM

**NOTICES**

Telecommunications standards:
- Coding and modulation requirements for full duplex 9600 bit/second modems, 51149
- Digital communication performance parameters; proposed, 41313, 46086

## NATIONAL CREDIT UNION ADMINISTRATION

**RULES**

Account insurance coverage, clarification and definition of:
- Share accounts and share certificate accounts; qualified trusts and individual retirement accounts, 57141

Federal Credit Unions:
- Fixed assets; written approval for investment, 58178
- Incidental powers; share accounts and share certificate accounts, 29271, 31126
- Loan origination fees, 37984
- Loans to credit union members; participation with other lenders, 51610
- Maturity mobile home lending authority; implementation, 17467
- "Of principle" removed from provisions, 15409
- Real estate lending, 14926
- Safe deposit boxes, 33899
- Sale of student loans, 36239
- Sale of 30 year real estate loans, 33900
- Share accounts and share certificate accounts, 29271, 31126, 54220
- Share accounts and share certificate accounts; qualified trusts and individual retirement accounts, 57141
- Share drafting programs, 5359
- Surety bond coverage, 6577
- Travelers checks, money orders, etc.; issuance, 20225

Federal Credit Unions; investments and deposits:
- Loans and lines of credit to nonmember credit unions, 15623

Flood insurance; granting of loans, 7614

Practice and procedure:
- Grounds for removal orders, 5800

Privacy Act; implementation, 5360

**PROPOSED RULES**

Federal Credit Unions:
- Borrowed funds from natural persons, 58096
- Credit union service corporation, 51407, 54100
- Fixed assets ownership, 26317
- Investment activities, 47731, 49543, 58096
- Loan participations, 33929
- Real estate lending, 14929, 19403

**NOTICES**

Equal credit opportunity and fair housing; enforcement guidelines, 29256

Improving Government regulations, 23688, 58654

Meetings:
- National Credit Union Board, 5114, 20282, 38474, 51728

Regulatory agenda; semiannual, 58654

## NATIONAL FIRE PREVENTION AND CONTROL ADMINISTRATION

**NOTICES**

Committees; establishment, renewals, terminations, etc.:
- National Academy for Fire Prevention and Control, 3148

Improving Government regulations, 23185

Meetings:
- Fire Training and Education Advisory Committee, 26605
- National Academy for Fire Prevention and Control, 8825, 43058
- National Academy for Fire Prevention and Control, Board of Visitors, 46362, 59115

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

*See Arts and Humanities, National Foundation.*

## NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

**RULES**

Administrative proceedings, financial assistance to participants; demonstration program extension, 10918

Bumper standards:
- Certification, 21891
- Damageability requirements, 20805, 40229

Certification:
- Bumper standards, 21891
- Chassis-cab manufacturers, 28814
- Multistage vehicles; intermediate manufacturers of trucks, 9605, 12014, 29124

Consumer information:
- Tire quality grading, uniform; non-passenger cars; testing temperature, 30542
- Tire quality grading, uniform; passenger cars; bias and bias belted tires, 30549
- Tire quality grading, uniform; testing temperature, 50440, 58824

Defect and noncompliance:
- Reports, 60169

Defect and noncompliance responsibility, 38835

Fuel economy standards, average:
- Trucks, light, and nonpassenger automobiles, 12013, 16181, 46547

Fuel economy standards, average; passenger automobiles; exemptions:
- Avanti Motor Corp., 28204
- Checker, 34785

Highway safety programs, State; uniform standards:
- Comprehensive plans, State; filling requirements, 9144

Information gathering powers; compulsory process; extension of time, 5516

Motor vehicle safety standards:
- Air brake systems, 9149, 48646, 58823
- Air brake systems for trucks, buses, and trailers, 39392, 43308
- Brake hoses, 22362
- Controls and displays, 27542
- "Designated seating position," notification to vehicle manufacturers, 21892
- Headlamps, 32418, 54933
- Identification numbers, 36452, 52250
- Lamps, reflective devices, etc., 38832, 38833, 60472
- Lighting; specifications for signaling devices, 25822
- Motorcycle brake systems, 46547
- Occupant crash protection, 52494
- School bus air brake systems, 12015
- School bus passenger seating and crash protection, 9150
- Seat belt anchorages, 21892
- Seat belt assembly anchorages, 53442
- Speed attainable in one and two miles; definitions added, 9606, 22364
- Speedometers and odometers, 10920, 32425
- Tire identification and recordkeeping; CFR correction, 60171
- Tire quality grading, uniform; non-passenger cars; testing temperature, 30542

Tire quality grading, uniform; testing temperature, 50440, 58824
Tires, new pneumatic, for passenger cars, 4859, 4860, 6093, 24314, 25823, 45366, 55248, 56669, 60162
Tires, passenger car; inflation pressure testing, 12015
Truck-camper loading, 17947
Vehicle weight, unloaded; definition, 9606
Odometer disclosure requirements, 10922
Organization and functions:
Authority delegation to Regional Administrators; highway safety plans etc., 51022
Powers and duties reorganization, 8525, 11995
Passenger automobiles and light trucks, enforcement, 47513
Rulemaking procedures; limitation of proposal comments, 31143
Vehicle classification; light trucks and nonpassenger automobiles; 1980-81 models, 12013, 16181, 46547
Vehicles manufactured in two or more stages:
Chassis-cab manufacturers, certification requirements for, 28814
Intermediate stage manufacturers of trucks, certification, 9605

**PROPOSED RULES**

Administrative proceedings, financial assistance to participants; regulatory agenda; five year draft plan; inquiry, 11100, 13905
Anthropomorphic test dummies; specifications, 21490, 53478, 56697, 58843
Automotive fuel economy reports; petitions for reconsideration:
General Motors Corp., 35517
Bumper standards:
Certification, 9167
Damageability requirements; terminated, 12049
Business information, confidential treatment, 22412, 28841
Certification:
Bumper standards, 9167
Consumer information:
Tire quality grading, uniform, 30586
Tire quality grading standards, uniform; test results, 51735, 57308
Fuel economy rulemaking; five year draft plan; inquiry, 11100, 13905
Fuel economy standards; average:
Nonpassenger automobiles; 1980-81 model years, 1370, 3600
Trucks, light; 1981 model year, 58838
Fuel economy standards, average; passenger automobiles; exemptions:
Avanti Motor Corp., 18575
Checker Motors Corp., 24871, 49336
Excalibur Automobile Corp., 33268
Rolls-Royce, 30081
Motor vehicle in use inspection standards; spacers in suspension systems; report, 48669
Motor vehicle safety rulemaking; regulatory agenda; five year draft plan; inquiry, 11100, 13905
Motor vehicle safety standards:
Air brake system; "No-lockup" requirements for trailers, 9626, 24871
Air brake systems; trucks, buses and trailers, 41056
Child restraint systems; seat belt assemblies and anchorages, 21470, 26758, 56697
Designated seating positions; dimensional clarification, 44556
Fields of direct view, 51677
Identification numbers, 2189, 10947, 52268
Lamps, reflective devices, and associated equipment, 7451
Lamps, reflective devices, etc., 16783, 19250, 60626
Lighting, 39839
Occupant crash protection, 21912
Occupant protection; steering control rearward displacement, 52264
Rearview mirror systems, 51657
Seat belt assembly anchorages, 22419
Theft protection, 18577
Tires, new pneumatic, for passenger cars, 8570, 13903, 22420
Record retention; interim rule; extension of time, 53479
Vehicle classification; nonpassenger automobiles, 1370, 3600

**NOTICES**

Accident sampling system, National; progress; meeting, 44581
Administrative proceedings, financial assistance to participants; allocation of funds, 53523
Advisory committees, closed meetings; reports availability:
Motor Vehicle Safety National Advisory Council, 8050
Automotive fuel economy program, Federal; report to Congress, 55302, 59577
Breath alcohol measuring devices; qualified products list, 27630, 27631
Bumper program; meeting, 51166, 60691
Committees; establishment, renewals, terminations, etc.:
Biomechanics Advisory Committee, 60691
Consumer information program; meeting, 51166, 60691
Field trip to Oklahoma City; National Highway Safety Advisory Committee; State-Federal Relations Subcommittee, 24932
Fuel economy program; second annual report to Congress, 3189, 11002
Fuel economy standards, average; passenger cars, 1978-1980 model years; exemption petitions
Aston-Martin Lagonda, Inc., 10456
Automobili Ferrucio Lamborghini S.p.A., 34859
Avanti Motor Corp., 35569
Excalibur Automobile Corp., 19311
Highway safety:
Highway fatality counting rule, 45486
Meetings:
Air brake systems, 17438
Automotive fuel economy program, Federal; report to Congress, 59577
National accident sampling system progress, 44581
National Highway Safety Advisory Committee, 1870, 8050, 13457, 17438, 19313, 26814, 34235, 38965, 49389, 50530, 51734, 56123, 58877
Pedestrian Impact Injury Workshop et al., 50067
Safety, bumper, and consumer information programs, 40331, 51166, 60691
Safety belt usage and comfort and convenience of safety belts in cars, 56744
Motor vehicle defect proceedings; petitions, etc.:
Bostwick, Nat; Volvo fuel injectors leaks, etc.; denial, 22476
Chestnut, Bette; Matador engine cooling fan; denial, 34235
Ehrleiu, Selina H.; Chrysler Corp. repair of defects; denial, 34235
Ferguson, Albert R.; motorcycle; denial, 13457
Firestone Tire & Rubber Co.; steel radial tires, 30156
Ford Pinto and Mercury Bobcat; fuel tanks and filler necks, 20291, 25404
Longacre, Harold, et al.; truck antilock brake systems, 32492
Pierce, Henry C.; Dodge Aspen, crankshaft pulley bolt failures; denial, 22476
Motor vehicle safety, damageability, and fuel economy standards; analysis; draft study; inquiry, 32007
Motor vehicle safety standards; exemption petitions, etc.:
American Bus Association et al.; air brake systems, 809, 1021
American Honda Motor Co., Inc., 49389
American Honda Motor Co., Inc.; brake system indicator lamps, 57366
Armored Vehicle Builders, Inc., 11002
Armored Vehicle Builders, Inc.; glazing materials, 43403
BMW of North America, Inc.; brake warning light lens, 53523
Bristol Cars Ltd.; exterior protection, 19310, 36547
Budd Co., 49389
Budd Co., lamps, reflective devices, and associated equipment, 8607
Daihatsu Motor Co. Ltd.; motorcycle braking systems, 12778, 36548
Ford Motor Co.; lamps, reflective devices, etc., 30157
General Engines Co.; motorcycle controls and displays, etc., 16842, 37791
General Motors Corp., 47631
General Motors Corp.; brake hoses, 6864, 8608, 30157
General Motors Corp.; fuel system integrity, 20292, 23780, 25214, 25400, 56123
General Motors Corp.; glazing materials, 19313, 59577
General Motors Corp.; occupant restraint systems, 18618, 38965, 55304
General Motors Corp.; tire selection and rims, passenger cars, 12778, 28882, 58876
Goodyear Tire & Rubber Co.; new pneumatic tires, passenger cars, 16234
Harborough Construction Co., Ltd., et al.; glazing materials, 28882
Hung-A Industrial Co., Ltd.; new pneumatic tires, 8609
International Harvester Co.; air brakes, 17437
Invacar, Ltd.; motorcycle controls and displays, 8608
Jet Industries, Inc., 49390
Jet Industries, Inc.; control location, identification and illumination, etc., 6192
Mack Trucks, Inc.; reflex reflector, 18618
Marathon Electric Vehicles, Inc.; low-emission motor vehicles, 27630, 49388
Modular Ambulance Corp., 47632

Officine Alfieri Maserati S.p.A.; average fuel economy, 46106
Paccar Inc., 55027
Pinetree Service Corp., 55027
Renault USA, Inc.; accelerator, 35571
Santa Clara County Council for Public Transit, 51166
Travel Equipment Corp., 47632
Vespa of America Corp.; motorcycle controls and displays, 8610, 53524
Vintage Reproductions, Inc., 6865, 26814
Volvo of America Corp.; tire selection and rims for passenger cars, 20292, 22476, 53305
Washington State Commission on Equipment; lamps, reflective devices, etc., 19313, 41127
Motorized bicycles (Mopeds), safety aspects; inquiry, 47040, 55026
Safety belt usage and comfort and convenience of safety belts in cars; meeting, 56744
Safety program; meeting, 51166, 60691
Vehicle safety, bumper, and consumer information programs; meeting, 40331

## NATIONAL INSTITUTE OF CORRECTIONS

### NOTICES

Advisory Board; bylaws, 61032
Grant and contract review process, 61033

## NATIONAL INSTITUTE OF EDUCATION

### RULES

Advanced study and research in education; experimental program grants, 33647
Grant programs:
Basic skills research; addition of mathematics learning and literacy, 2878
Educational equity research, 43672

### PROPOSED RULES

Advanced study and research in education; experimental program for opportunities, 8234
Grant programs:
Educational equity reseach, 14634

### NOTICES

Educational research and development activities, unsolicited proposals, 18127, 50045
Grant programs, application closing dates:
Advanced study and research in education, 8238, 25193, 43073
Educational equity research, 14636
Organizational processes in education, 57658
State dissemination, FY 78, 12950
Teaching and learning research, 57659
Improving Government regulations, 23135
Information collection and data acquisition activity; description; inquiry, 5072, 7072, 7369, 7477, 19293, 21738, 23015, 27237, 30899, 31237
Meetings:
Laboratory and Center Operations Review Panel, 28252, 47015, 54699
Review of Laboratory and Center Operations Panel, 3623, 13097, 40059, 51144, 52526
Meetings; Sunshine Act, 8346, 10680, 19754, 21408, 29247, 32926, 40350, 59970
Research grants on organizational processes in education; applications closing dates, 11268

## NATIONAL INSTITUTES OF HEALTH

### NOTICES

Advisory Committees; annual reports filing, 47285
Aging, Biology of; workshop, 1547
Agricultural pathogens risk assessment; workshop, 9207, 9360
Antenatal Diagnosis Consensus Development Conference; meetings, 59440
Cancer prevention; quantitative aspects; conference, 37220
Carcinogenesis bioassay reports; availability:
Acetohexamide, 35552
Acronycine, 30355
Aldrin and dieldrin, 2450
Allyl chloride, 50253
2-Amino-5-nitrothiazole, 32191, 40061
1-Amino-2-methylanthraquinone, 47289
4-Amino-2-nitrophenol, 45645
3-Amino-9-ethylcarbazole (hydrochloride), 47289
2-Aminoanthraquinone, 51451
Anilazine, 49055
Aniline hydrochloride, 50741
Anthranilic acid, 14130
Aroclor 1254, 17060
Aspirin, phenacetin, and caffeine mixture (APC), 35750
5-Azacytidine, 15785
Azinphosmethyl, 46585
1H-Benzotriazole, 40061
Beta-2'-deoxy-6-thioguanosine monohydrate, 23015
C.I. vat yellow 4, 56280
4-Chloro-o-phenylenediamine, 30356, 39431
2-Chloro-p-phenylenediamine sulfate, 46382
3-Chloro-p-toluidine, 49574
4'-(Chloroacetyl)-acetanilide, 53828
Chlorobenzilate, 47793
3-(Chloromethyl)pyridine hydrochloride, 47289
Chloropicrin, 26138
Chlorothalonil, 46382
Clonitralid, 47793
M-Cresidine, 44891
Cupferron, 50254
Dairylanilide yellow, 11760
Daminozide, 39181
DDT,TDE and P,P'-DDE, 46585
N,N'-Diethylthiourea, 53829
2,4-Diaminoanisol sulfate, 16417
Dibenzo-p-dioxin, 54995
Dibromochloropropane, 8189
1,2-Dibromoethane, 52775
1,1-Dichloroethane, 32190, 43564
Dicofol, 44890
N,N'-Dicyclohexylthiourea, 23016
2,4-Dimethoxyaniline hydrochloride, 53828
2,4-Dinitrotoluene, 21737
1,4-Dioxane, 41285
Dioxathion, 45645
Direct blue 6, direct black 38, and direct brown 95 dyes, 19923
Dl-menthol, 54995
Emetine, 14131
Endosulfan, 25193
Endrin, 54298
Estradiol mustard, 42042
Ethionamide, 39431
Formulated fenaminosulf, 50254
Hexachloroethane, 27238
Hexachlorophene, 15785
Hydrazobenzene, 40548
ICRF-159, 42042
3,3'-Iminobis-1-propanol dimethanesulfonate-(ester) hydrochloride (IPD), 8854
In vitro carcinogenesis, 24607
Iodoform, 46383
Isophosphamide, 2942
Lasiocarpine, 12950
Lithocholic acid, 54298
Malathion, 12385
Methoxychlor, 11760
2-Methyl-l-nitroanthraquinone, 9359
Mexacarbate, 49575
N-(1-Naphthyl)ethylenediamine digydrochloride, 59908
1,5-Naphthalenediamine, 51451
1-Nitronaphthalene, 26139, 43074, 49575
5-Nitroacenaphthene, 50742
4-Nitroanthranilic acid, 49055
Nitrofen, 8854
3-Nitropropionic acid, 21737
O-anisidine hydrochloride, 43074
P-Anisidine hydrochloride, 47793
Parathion, 55467
Pentachloronitrobenzene, 25193
Phenazopyridine hydrochloride, 45646
Phenesterin, 30356
Phenoxybenzamine Hydrochloride, 39180
N-Phenyl-P-phenylenediamine, 41286
1-Phenyl-2-thiourea, 50254
1-Phenyl-3-methyl-5-pyrazolone, 49054
Phosphamidon, 55467
Picloram, 5076
Piperonyl butoxide, 55467
Piperonyl sulfoxide, 56281
Pivalolactone, 50742
Pyrazinamide, 20562
Pyrimethamine, 27238
Sulfallate, 46585
Sulfisoxazole, 56281
3-Sulfolene, 35950
2,3,5,6-Tetrachloro-4-nitroanisole, 50741
1,1,2,2-Tetrachloroethane, 9359
Tetrachlorvinphos, 12951
Thio-TEPA, 43074
4,4'-Thiodianiline, 20562
Titanium dioxide, 54299
Tolazamide, 35552
2,5-Toluenediamine sulfate, 49055
1,1,2-Trichloroethane, 30356
Trichlorofluoromethane, 44890
Trifluralin, 12385
Trimethylphosphate, 42043
Trimethylthiourea, 54299
Triphenyltin hydroxide, 49575
Tris phosphate, 19462
L-Tryptophan, 40548
Committees; establishment, renewals, terminations, etc.:
Animal Resources Advisory Committee et al., 40061
Animal Resources Review Committee, 47286
Bioanalytical and Metallobiochemistry Study Section et al., 44570
Bladder and Prostatic Cancer Review Committee, 5896
Cancer and Nutrition Scientific Review Committee, 15783
Cancer Control Grant Review Committee, 11270

Cancer Control Intervention Programs Review Committee, 45479
Cancer Institute, National Advisory Committees, 49853
Carcinogenesis Program Scientific Review Committee, 11269
Cause and Prevention Scientific Review Committee, 45479
Clearinghouse on Environmental Carcinogens, 22787
Clinical Cancer Program Project and Cancer Center Support Review Committee, 5896
Clinical Trials Committee, 45479
Dental Researh National Advisory Council, 50970
Director, Advisory Committee to; et al., 6325
General Medical Sciences National Advisory Council, 50970
Laetrile Retrospective Analysis Evaluation Committee, 30357
Large Bowel and Pancreatic Cancer Review Committee, 5896
National Cancer Institute Committees, 47288
Recombinant DNA Advisory Committee, 49853
Recombinant DNA Molecule Program Advisory Committee, 30357
Scientific Counselors Board, Cancer Cause and Prevention Division, 5074
Tumor Immunology Committee, 45479
Virus Cancer Program Scientific Review Committee, 11271
Environmental Health Sciences National Institute; reports, availability, 49854
Human in vitro fertilization, 50507, 55286
Immunobiology study section workshop, 17059
Inhalation Toxicology Basics Workshop; meeting, 1547
Meetings:
Aging, Biology of, Workshop, 1547
Aging National Advisory Council, 16416, 37221, 59438
Aging Review Committee, 5893, 22787, 49851
Agricultural pathogens risk assessment; workshop, 9207, 9360
Alcohol and cancer, workshop, 39431
Allergy and Clinical Immunology Research Committee, 5893, 16415, 44568
Allergy and Immunology Study Section et al., 2004, 5074, 18260, 21737, 40921
Allergy and Infectious Diseases National Advisory Council, 2007, 16416, 37221, 59437
Animal Resources Advisory Committee, 5073, 18260
Animal Resources Review Committee, 45478, 49851
Arteriosclerosis and Hypertension Advisory Committee, 5073, 7716, 13633, 17059, 37219, 44568
Arthritis, Metabolism, and Digestive Diseases Board of Scientific Counselors, 44568
Arthritis, Metabolism, and Digestive Diseases National Advisory Council, 15784, 30358, 37221, 59439
Arthritis National Advisory Board, 7716, 26138, 32190, 50743, 56734, 59439
Artificial Kidney-Chronic Uremia Advisory Committee, 15782, 40920, 48016
Behavioral Sciences Research Contract Review Committee, 15782
Bio-Psychology Study Section et al., 44569
Bioanalytical and Metallobiochemistry Study Section, 7716
Biomedical Library Review Committee, 5893, 21736, 48016
Biometry and Epidemiology Contract Review Committee, 30358
Biotechnology Resources Advisory Committee, 7716
Biotechnology Resources Review Committee, 28562
Bladder and Prostatic Cancer Review Committee, 53058
Blood Diseases and Resources Advisory Committee, 14128, 55285
Board of Regents, 16415
Cancer Clinical Investigation Review Committee, 5075
Cancer Control and Rehabilitation Advisory Committee et al., 41438, 44569
Cancer Control Community Activities Review Committee, 11269
Cancer Control Grant Review Committee, 42788
Cancer Control Intervention Programs Review Committee, 42788
Cancer Control Prevention, Detection, Diagnosis, and Pretreatment Evaluation Review Committee, 6326, 15196, 21058, 23655, 24143
Cancer Control Treatment, Rehabilitation and Continuing Care Review Committee, 7045
Cancer Immunotherapy Committee, 3441, 3769, 3770, 5895, 8189, 11270, 14128
Cancer Institute, National; advisory committees, 1547, 2008, 3771, 5074, 5075, 9358, 11269, 13634, 14129, 14130, 18262, 19463, 22788, 24607, 28561, 30359, 35112, 35113, 36005, 39430, 50742, 52526, 59440, 59441
Cancer Institute, National; Cancer Treatment Division, 50743
Cancer Institute, National; contract proposals and grant applications review, 5894
Cancer National Advisory Board, 5076, 8189, 17059, 17060, 22789, 37222, 47288, 57979, 60235
Cancer Panel, President's, et al., 45478, 47288, 50743
Cancer Prevention - Quantitative Aspects Conference, 37220
Cancer Research Manpower Review Committee, 49852
Cancer Treatment Division, Cooperative Group Chairmen, 18264
Carcinogenesis Program Scientific Review Committee, 4684, 13633, 19463, 21735, 31068
Cardiology Advisory Committee, 14128, 37220, 42789, 57977
Cause and Prevention Scientific Review Committee, 55286
Cell hypridization and immunology workshop, 39429
Cellular and Molecular Basis of Disease Review Committee, 16416, 40921
Child Health and Human Development National Advisory Council, 15783, 40923, 59437
Child Health and Human Development National Institute, 47287
Clearing house on Environmental Carcinogens, 14129, 47287, 52527
Clinical Applications and Prevention Advisory Committee, 5893, 12384, 22787, 35109, 44568, 57977
Clinical Cancer Education Committee, 2004, 19463, 22788, 47287
Clinical Trials Review Committee, 7045, 7046, 22788, 26138, 32190, 49852
Colorectal Cancer Screening and Early Detection Conference, 20563
Combined Modality Committee, 20562
Communicative Disorders Review Committee, 18263, 36004, 59437
Communicative Sciences Study Section, 21736
Consensus Development Conference on Antenatal Diagnosis, 59440
Contraceptive Evaluation Research Contract Review Committee, 11270
Cytology Automation Committee, 57977
Decline in coronary heart diseases conference, 40060
Dental Caries Program Advisory Committee, 19465, 40060
Dental Research Institutes et al., 9358
Dental Research National Advisory Council, 15783, 30357, 59438
DES Task Force Committee, 18259, 18263
Developmental Therapeutics Committee, 8189
Diabetes National Advisory Board, 2008, 3768, 3771, 6325, 11271, 13634, 18259, 27898, 37222, 43768, 50970, 56734, 59438
Digestive Diseases National Commission, 1547, 3770, 7717, 18259, 19465, 21736, 32190, 35113
Director's Advisory Committee, 23655, 24143, 55285
Environmental Health Sciences National Advisory Council, 2007, 16417, 35110, 59438
Epilepsy Advisory Committee, 39430
Ethics Advisory Board, 2007, 13633, 36004, 44890, 50507, 55286
Eye Institute, National, 47287
Eye National Advisory Council, 18262, 35110, 57978
General Clinical Research Centers Committee, 3442, 3770, 26494, 50743
General Medical Sciences National Advisory Council, 16417, 35110, 59439
General Medical Sciences National Institute, 2450
General Medicine A Study Section, 6324
General Research Support Program Advisory Committee, 6324, 7046, 7717, 12384, 21735, 22787
General Research Support Review Committee, 49852, 53058
Heart, Lung, and Blood National Advisory Council, 15784, 35110, 48017, 59439
Heart, Lung, and Blood National Institute, 3770, 52526
Heart, Lung, and Blood Research Review Committee, 6324, 7046, 22788, 49853
High Blood Pressure Working Group, 11270, 28561, 41438
Immunobiology Study Section Workshop, 17059
Inhalation Toxicology Basics Workshop, 1547
Institutional Biosafety Committees Chairmen; workshop, 40062

Laetrile Retrospective Analysis Evaluation Committee, 31069
Lipid Metabolism Advisory Committee, 11270, 37220, 57978
Lung Cancer Screening State-of-the-Art Conference, 35112
Mammalian Cell Lines Committee, 15783, 35111
Maternal and Child Health Research Committee, 18262, 48017
Mental Retardation Research Committee, 9358, 30359, 50743, 52526
Microbiology and Infectious Diseases Advisory Committee, 5895, 7716, 21059, 44568
Minority Access to Research Careers Review Committee, 22789, 44569
National Library of Medicine, Board of Regents, 27238, 37221, 37222, 59437
Neurological and Communicative Disorders and Stroke National Advisory Council, 13634, 35111, 40060, 57978
Neurological and Communicative Disorders and Stroke National Institute, 5074, 17059, 40924
Neurological and communicative disorders National research strategy, 16416
Neurological Disorders Program, 18263, 40923
Neurological Sciences Study Section, 7717
NIDR Special Grants Review Committee, 45478
Older Woman; Continuities and Discontinuities Conference, 30357
Pediatric Hematology-Oncology, Graduate Education Workshop, 30358
Periodontal Diseases Advisory Committee, 19465, 44570
Pharmacology-Toxicology Research Program Committee, 6325, 24607
Pharmacology-Toxicology Review Committee, 44570
Population Research Committee, 9207, 9360, 21736, 48017
Potentiation of immune response to vaccines symposium, 57979
Primate Research Centers Advisory Committee, 5075
Primates in nutrition, workshop, 39430
Pulmonary Diseases Advisory Committee, 9358, 37223
Radiation Study Section Workshop, 17060
Recombinant DNA Advisory Committee, 30358, 37223, 47288
Recombinant DNA Molecule Program Advisory Committee, 2007, 3771, 7270, 11271, 14129, 15784
Research Manpower Review Committee, 9360, 15784, 24607, 53058
Research Resources National Advisory Council, 3770, 18260, 35113, 36004, 40060
Sarcomas of soft tissue and bone in childhood; symposium, 55286
Scientific Counselors Board, 6323, 6324, 12384, 15782, 19464, 19465, 24606, 35109, 39429, 39430, 49852
Sickle Cell Disease Advisory Committee, 9360, 32190, 40549
Sleep and Age, conference, 14130
Surgical oncology graduate education workshop, 28561
Therapeutic agents, new; role of NIGMS/NIH, 12384
Toxicology and Related Programs Coordinating Committee, 37220
Transplantation Biology and Immunology Committee, 16417, 26139, 50744
Tumors of T and B Lymphocytes, functional properties of; workshop, 9358
Virus Cancer Program Scientific Review Committee et al., 31069, 35750, 40924, 44570
Vision Research Program Committee, 7046, 18264, 48018
Neurological and communicative disorders, National research strategy development; forum, 16416
Older Woman; Continuities and Discontinuities; Conference, 30357
Pediatric Hematology-Oncology, Graduate Education Workshop; meeting, 30358
Potentiation of immune response to vaccines symposium; meeting, 57979
Primate Plan, National; availability; inquiry, 5895
Radiation study section workshop, 17060
Recombinant DNA experiments involving genomes of animal, plant, and insects viruses; report, 13748
Recombinant DNA research; revised guidelines, 33042, 36329, 60080, 60134
Sarcomas of soft tissue and bone in childhood; symposioum, 55286
Sleep and Age, conference, 14130
Surgical oncology graduate education workshop, 28561
Therapeutic agents, new; role of NIGMS/NIH; conference, 12384
Tumors of T and B lymphocytes, functional properties of; workshop, 9358

## NATIONAL LABOR RELATIONS BOARD

### NOTICES

Meetings; Sunshine Act, 2274, 2812, 7394, 12987, 17113, 22296, 29663, 42853, 46627, 50124, 52602, 54776, 58472, 60250
Privacy Act; systems of records, 38646
Privacy Act; systems of records; annual publication, 43640

## NATIONAL MEDIATION BOARD

### RULES

Service applications; investigation of representation disputes, 30053

### PROPOSED RULES

Procedure rules:
Briefs; page limitations, 52032
Representation disputes under Railway Labor Act; time limits on applications, 49015
Service applications; investigation of representation disputes, 54267

### NOTICES

Meetings; Sunshine Act, 1432, 3473, 7084, 13162, 15405, 22517, 25529, 27281, 32369, 38665, 39638, 42101, 48814, 51896, 55837, 60367

## NATIONAL OCCUPATIONAL INFORMATION COORDINATING COMMITTEE

*See Occupational Information Coordinating National Committee.*

## NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

### RULES

Administrative proceedings, financial compensation of participants, 17811
Coastal energy impact program:
Grants and credit assistance to coastal States and communities, 7550
Lateral seaward boundaries, 32743
Coastal zone management programs:
Development and approval of programs, 8395, 29106
Federal consistency provisions; implementation procedures, 10517, 15416
Endangered species; interagency cooperation, 874
Financial aid to fisheries:
Fishing vessel obligation guarantee program, procedures, 9153
Foreign vessel caused damage in U.S. Fishery Conservation Zone; compensation, 45870
Guarantee agreements; fees, 44858
Fishery conservation and management:
Atlantic groundfish, 778, 6094, 13578, 14969, 17362, 19233, 20505, 27549, 28504, 31018, 31341, 32427, 35488, 39108, 41405, 42765, 45874, 52252, 53040, 55412, 58570
Foreign fishing; activities within fishery conservation zone (FCZ), 59293, 60172
Foreign fishing; allocation increases, 59846
Foreign fishing; Bering Sea Pacific cod and sablefish; incremental apportionment of allocations, 50442
Foreign fishing; bullfishes and sharks, 11825
Foreign fishing; correction, 2726
Foreign fishing; fee schedule, etc., 19232
Foreign fishing; fixed gear avoidance, 10934
Foreign fishing; foreign fee surcharge, 59508
Foreign fishing; gear amendment, 29949
Foreign fishing; groundfish in Gulf of Alaska, 52715, 56241
Foreign fishing; Gulf of Alaska trawling and longlining; sablefish (blackcod), 27548, 30065
Foreign fishing; herring gillnet fisheries in Bering Sea etc.; yield increase, 54638
Foreign fishing; Northwest Atlantic Ocean; 1978 quarterly reports, 60930
Foreign fishing; Pacific cod harvesting, 15431
Foreign fishing; Pacific cod in Gulf of Alaska; clarification, 39586
Foreign fishing; sablefish of Eastern Bering Sea and Northeastern Pacific; PMP, 27550
Foreign fishing; short-finned squid (Illex) and southern New England Atlantic silver hake stock, 35720
Foreign fishing; tanner crabs, 10566, 29128, 59076
Foreign fishing; trawl fisheries, 27551, 35925, 43462, 51637, 58191
Foreign fishing; U.S. citizens sustaining losses to gear; reimbursement, 3567
Foreign fishing; 1979 fee schedule, 57148
Gulf of Alaska groundfish, 52717, 56241
Herring, Atlantic; fishery management plan, emergency regulations, 60476
Northern Anchovy fishery, 40870

Salmon fisheries off Wash., Oreg., and Calif., 15630, 21681, 22214, 27993, 29793
Surf clam and ocean quahog fisheries, Atlantic, 4029, 6953, 7209, 13582, 19396, 19397, 27549, 40527, 42765, 46033, 50442, 54252, 54639, 59388, 59389
Tanner crab off Alaska, 57150
Fishery products, processed:
Inspection and certification; fees and charges, 1094
Inspection and certification; lot inspections, rates contract basis, 6952
Information disclosure and NOAA employee testimony; policies and procedures, 36240
Marine mammals:
Dolphin, northern common; commercial fishing operations; taking prohibited, 28502
Dolphin, northern striped; commercial fishing operations; taking prohibited, 46975
Pribilof Islands, administration; wildlife research, 5521
Tuna, yellowfin, and products; importation and taking; commercial fishing operations; exemption of certain countries from importation prohibition, 1094, 3566, 5521, 36263
Tuna, yellowfin; importation and taking; purse seine fishing from Congolese, Senegalese, and Spanish vessels, 40025
Tuna, yellowfin; importation and taking; purse seine fishing operations in Venezuela, 31145
Tuna, yellowfin; importation and taking; quotas, etc.; corrections, 1627
Turtles, loggerhead and ridley; endangered and/or threatened species, 54640, 56044, 57147
Turtles, loggerhead sea and green and olive ridley sea; endangered and/or threatened species, 32809
Salmon; Fraser River sockeye and pink salmon fishery, 26737
Sea grant program funding regulations, National, 15307, 35030
Tuna, Atlantic fisheries:
Bluefin tuna; "buy boat" certificates, 39108
Bluefin tuna; catch quotas, seasons, etc., 26583, 27547, 28502, 29788, 41044
Yellowfin tuna and tuna import restrictions, 8554
Tuna, Pacific fisheries:
Yellowfin tuna; conservation, etc., 29789
Whaling:
Bowhead whales; taking by Indians, Aleuts, or Eskimos for subsistence purposes, 13886, 14477, 22214, 43026
Whaling Commission, International:
Bering Sea bowhead whale quota increases, 43309
Definitions, seasons, capture, etc., 9481
Schedule amendments, 47528

**PROPOSED RULES**

Administrative proceedings, financial compensation of participants; extension of time, 9623
Coastal zone management programs:
Development and approval; procedures, 60949
Endangered species; interagency cooperation:
Whales, humpback; protection in Hawaii; hearing, 25349
Financial aid to fisheries:
Atlantic groundfish fishery, 33946
Foreign vessel caused damage in U.S. Fishery Conservation Zone; compensation, 20255
Fish and wildlife conservation in water projects; advance notice, 44870
Fishery conservation and management:
Anchovy fishery, Northern, 31652, 60970
Atlantic Groundfish; annual allocations of cod and haddock by vessel classes; plan amendment approval, 21339
Billfishes and sharks, Atlantic, 32840, 35736, 38448
Cod, haddock, yellowtail flounder; hearings of New England Fishery Management Council et al., 3601
Fishery management plans, development guidelines, 1460, 49023
Foreign fishing; activities within fishery conservation zone (FCZ), 51053, 58104
Foreign fishing; Bering Sea Pacific cod and sablefish; incremental apportionment of allocations, 46054
Foreign fishing; billfishes and sharks, 3292, 31374, 41062, 49024, 52034, 55268
Foreign fishing; fee schedule, etc., 33776
Foreign fishing; foreign fee surcharge, 50928
Foreign fishing; Gulf of Alaska groundfish, 34825, 46349, 47222, 50474
Foreign fishing; Gulf of Alaska trawl and sablefish (blackcod), 17013
Foreign fishing; hake fisheries of Northwestern Atlantic, 31185
Foreign fishing; halibut fishery, off Alaska; hearings, 41244
Foreign fishing; permit application policy, 5398
Foreign fishing; short-finned squid (Illex) and southern New England Atlantic silver hake stock, 31183
Foreign fishing; squid fisheries of Northwestern Atlantic, 31186, 55809
Foreign fishing; tanner crab, 21170, 54964
Foreign fishing; trawl and herring gillnet fisheries in Bering Sea, etc.; optimum yield increase, 50473
Foreign fishing; trawl fisheries of Wash., Oreg., and Calif.; hearings, 54963
Foreign fishing; trawl fishery off Calif., Oreg., and Wash.; region total allowable level, 34510
Gulf of Alaska groundfish, 17242, 34825, 46349, 47222, 50474
Halibut off coast of Alaska; draft fishery management plan, 45909, 46054, 50477
Herring, groundfish, and ocean perch fishery management plans, etc.; meeting, 22064
Regional fishery management councils, 1460
Salmon fisheries off coasts of Wash., Oreg., and Calif., 18219, 23748, 57931
Sea herring, Atlantic, management plan; hearings, 20519, 23747
Statistics confidentiality, 1460
Surf clam and ocean quahog fisheries, 21, 22064, 29818, 39161, 46880
Tanner crab fishery, commercial, off Alaska, 21170, 52034
Fishery products, processed:
Fish blocks, frozen minced; grade standards, 33270
Inspection and certification; advance notice, 53047, 56076
Scallops, frozen fried; grade standards, 32318
Information disclosure and NOAA employee testimony; policies and procedures, 16745
Marine mammals:
Bowhead whales; taking by Indians, Aleuts, or Eskimos for subsistence; withdrawn, 3921
Leatherback sea turtle, critical habitat, 55806
Sea turtles, 12050, 12735, 13906
Whales, humpback; importation and taking; protection in Hawaii; hearing, 25349
Marine mammals, fish, and reptiles; designated critical habitat:
Sea turtles, Kemp's ridley and loggerhead, 45905, 48669, 55267
Tuna, Atlantic fisheries:
Bluefin tuna, 10592, 20027
Tuna, Pacific fisheries:
Yellowfin tuna conservation, etc., 16783
Whaling:
Bowhead whales; taking by Indians, Aleuts, or Eskimos for subsistence purposes, 9172, 38609, 40045

**NOTICES**

Capital construction fund:
Interest rates on nonqualified withdrawals, 59537
Coastal zone management programs; environmental statements, hearings, etc.:
California, 7339, 19259, 26101, 60330
Georgia, 60330
Hawaii, 21925, 51829
Louisiana, 35741, 60330
Maine, 18734, 51829
Maryland, 24725, 51829
Massachusetts, 25169, 58401
Michigan, 51829
New Jersey, 21029, 51829
North Carolina, 15350, 51829
Puerto Rico, 13089, 51829
Rhode Island, 25169
Texas, 60330
Washington, 56255
Wisconsin, 25169
Committees; establishment, renewals, terminations, etc.:
U.S.-Spanish Fisheries Board, 13088
Weather Modification Advisory Board, 57174
Endangered species; interagency cooperation:
Salmon (Pacific) and trout (steelhead); Upper Columbia River Basin, 45628
Endangered species parts or products; certificates of exemption, 1116, 6127
Endangered species permits; applications, 2204, 6826, 13089, 50955
Fishery failure due to resource disaster; Virginia, 7685
Fishery management plans, environmental statements, meetings, etc.:
Anchovy fishery, Northern; optimum yield, harvest quotas, and foreign fishing level, 31191
Billfishes and sharks, Atlantic, 3818
Cod, 8282, 9515, 11246, 11247
Cod, haddock, and yellowtail flounder, 19060, 19429
Foreign fishing; Mexican zone; licensing procedures; shrimp or snapper/grouper, 19257
Foreign fishing; U.S. fishing gear protection, 1816

Foreign fishing; U.S. ventures within fishery conservation zone; policy statement, 20532
Foreign fishing permits; preliminary determinations, 49032
Groundfish, Atlantic, 783, 784, 13087, 13601, 14982, 17388, 20531
Groundfish, Bering Sea/Aleutian Islands area, 39602
Groundfish, Gulf of Alaska, 17023
Groundfish, New England, 8283
Haddock, 11247
Herring fishery, Northwestern Atlantic, et al.; correction, 1980
King and tanner crab; Eastern Bering Sea, 9842
Mackerel, squid, and butterfish, Mid-Atlantic; hearings, 39166, 44562
North Pacific fur seals, 57173
Salmon fisheries, commercial and recreational; Pacific Coast, 10426
Salmon fishery, High Seas off coast of Alaska, 39603
Sea herring, Atlantic; hearing, 24885
Shark and butterfish, 8826
Stone crab fishery; Gulf of Mexico; hearings, 51436
Surf clam and ocean quahog, 10426
Surf clam fishing day designation and change, hearings, 8283
Trawl, Gulf of Alaska, 15472
Tuna, yellowfin; season closure, 19258
Fishery products, international codes of practice; availability, 34829
Fishery transfer applications:
Cervantes, Julian A., 6828
Ellingson Fishing Corp., 29024
Gulf Shrimp Boats, Inc., 17023, 17024
Hampton, William L., Jr., 17024
Rocomora, Mario, Jr., 28027
Watts, Luther D., et al., 6827
Fishing by foreign vessels in U.S. waters:
Fee schedule, 3420
Foreign nations fishing for resources subject to U.S. jurisdiction, fees; workshop, 22067
Improving Government regulations; inquiry, 23188
Marine mammal permit applications, etc.:
Alaska Department of Fish and Game, 11730, 45628, 52274
Aquarium of Cape Cod, Inc., 10615, 19256
Chicago Zoological Park, 55273
Coastal Marine Laboratory; modification, 14711
Dawson, Dr. William W., 42776, 54284
De la Poype, Roland, 58222
Demetrius, Michael B., 8283
Detroit Zoological Park, 6827
El Paso Zoological Park, 26344
Elsner, Robert, 58221
Foerder, Lawrence J., 5035, 24116
Fort Wayne Children's Zoological Gardens, 60183
Gelberg, Dr. Howard, 4449, 14982, 58221
Geological Survey, Paleontology Branch, 55273
Gulf Exhibition Corp., 15178, 25853
Hall, Dr. Nicholas R., et al., 6826, 24116
Herman, Dr. Louis, 11729, 50727
Hubbs-Sea World Research Institute, 4273, 13602, 16364, 17993, 28849, 31190
Japan Deep Sea Trawlers Association et al., 23629
Johnson, Dr. Murray L., et al., 4273
Kooyman, Dr. Gerald L., 13088, 25853
LeBouef, Dr. Burney J., et al., 47994
Mammals of Sea Research Association, 17024
Marine Animal Productions, Inc. et al., 4450, 11730, 17024
Marineland Oceanarium and Aquariums, 19258
Marineland of Morecambe, 10614
Marineland S.A., 3148, 13602
Marineworld-Africa USA, 17523
Mate, Dr. Bruce, 30, 5035, 13603
Mattila, David, 58849
Ministry of Fisheries, USSR, 25709
Minnesota Zoological Garden, National Marine Fisheries, 2204
Montreal Zoological Park, 19257, 28849
Mystic Marinelife Aquarium, 4450, 11730, 14532, 19700, 35375
National Zoological Gardens of Sri Lanka, 4273
Norris, Dr. Kenneth S., 5035
Northwest and Alaska Fisheries Center, 13603, 19257
Personius, Robert, 58849
Quinlan Marine Attractions, 35374, 45912
Rabb, George B., 45911
S.E.E. Okeansky Ribolov, Bourgas, Peoples Republic of Bulgaria, 9632, 19905
Sea Artists Enterprises, Walter Moser-Jackle Ltd., 17025, 27223
Sea Search, Ltd., 17025, 27223
Sea World, Inc., 18735, 29599
Sea-Arama, Inc., 33797
Sea-Arama Marineworld, 6827
Siniff, Dr. Donald B., 20029, 29599
Southwest Fisheries Center (NOAA), 6827, 11730, 14982, 28849, 37738, 52274
Sovrybflot, Moscow, U.S.S.R., 7472, 29600
Stadt Nurnberg, 36130, 43058
United Fishermen of Alaska et al., 3301, 13603
USSR Ministry of Fisheries Administration, 35375
van den Oever, A., 45912, 54284
Whittow, Dr. G. Causey; correction, 11729
Zoological Society of London, 21497, 29598
Marine mammals:
Roughed-toothed dolphin; incidental taking; commercial fishing operations; prohibition, 9632
Marine mammals; annual report, availability, 36671
Marine sanctuaries:
Flower Garden Banks, white paper availability, 28530
Potential, offshore California; workshop, 14532, 14533
Marine turtles conservation; meeting, 24115
Meetings:
Caribbean Fishery Management Council et al., 1523, 7996, 9841, 12902, 12903, 22231, 31961, 33951, 47768
Coastal Zone Management Advisory Committee, 7472, 22231
Foreign nations fishing for resources subject to U.S. jurisdiction, fees, 22067
Gulf of Mexico Fishery Management Council, 3421, 3737, 7996, 9841, 17993, 18231, 20029, 23628, 24348, 26471, 29599, 31056, 32162, 35521, 36671, 39408, 39848, 43343, 47234, 47601, 47602, 49830, 51829, 55813, 58400
Marine Fisheries Advisory Committee, 783, 6297, 15766, 45912
Marine sanctuaries, potential, offshore California, 14532, 14533
Marine turtles conservation, 24115
Mid-Atlantic Fishery Management Council, 1815, 3738, 4450, 4876, 11844, 15766, 25169, 26472, 27577, 29974, 31056, 32162, 32445, 38069, 39166, 39848, 44561, 47602, 53790, 53791, 55436, 58607, 60183
New England Fishery Management Council et al., 2916, 3926, 4451, 7339, 7685, 11246, 17025, 17994, 22770, 23626, 24115, 24885, 25169, 25356, 26472, 29974, 31427, 33287, 35521, 40544, 41255, 46060, 50489, 53492, 58221
North Pacific Fishery Management Council et al., 1815, 2424, 3738, 6642, 9841, 11592, 13602, 15350, 20030, 24115, 24886, 30594, 35090, 35522, 36990, 44561, 44562, 47234
Pacific Fishery Management Council et al., 31, 4273, 6127, 6297, 7997, 7998, 9193, 9194, 10615, 11592, 12903, 19258, 23752, 29974, 31961, 32162, 33287, 39848, 43343, 46889, 47602, 49830, 50236, 54284, 55273, 56701, 57173, 58401, 60183
Regional Fishery Management Council Chairmen, 8577, 45910
Sea Grant Review Panel, 19700, 50727
South Atlantic Fishery Management Council et al., 2424, 11246, 18232, 19701, 23629, 30328, 35741, 35742, 41073, 43343, 47234, 52509
State fish and wildlife directors coastal and Great Lakes States, 9632
Weather Modification Advisory Board, 784, 9515, 13088, 16364, 19430
Western Pacific Fishery Management Council, 7998, 11845, 19259, 24886, 30328, 35522, 39408, 45629, 51830, 54284
Ocean mining, deep; environmental guidelines; inquiry; extension of time, 1378
Organization and functions:
Caribbean Fishery Management Council; correction, 23752
Gulf of Mexico Fishery Management Council; correction, 23752
Seafood species, nomenclature project; model retail identification plan; availability, 46888
State fish and wildlife directors, coastal and Great Lakes States; meeting, 9632
Weather Modification Advisory Board; report availability, 30328

## NATIONAL PARK SERVICE

### RULES

Alaska national monuments, 60254
Backcountry camping registration:
Hawaii Volcanoes National Park, Hawaii, 17357
Fishing:
Rocky Mountain National Park, Colo., 14308
Food storage:
Grand Teton National Park, 35482
Freehold and leasehold interests; conveyance on NPS lands, 3360
Hunting; parking, and use of lights:
Rocky Mountain National Park, Colo., 46850
Minerals management, 57825

Motorcycle operations:
Padre Island National Seashore, Tex., 6229
National Capital Parks:
Demonstrations and special events; White House sidewalk, 14654
Traffic speed limits; Yellowstone National Park, Wyo., 21460
Vehicles, immobilized and inoperable; Grand Canyon National Park, Ariz., 1793

**PROPOSED RULES**

Backcountry camping registration:
Hawaii Volcanoes National Park, Hawaii, 779
Bathhouse regulations:
Hot Springs National Park, Ark., 35071
Fire Island National Seashore, N.Y.; zoning standards, 41414
Fishing:
Yellowstone National Park, Wyo., Mont., Idaho, 9321
Hunters; parking, and use of lights:
Rocky Mountain National Park, Colo., 30313
Hunting:
Big Thicket National Preserve, Tex., 6261
Minerals management; extension of time, 2188
Oversand vehicle operations:
Cape Cod National Seashore, Mass., 12042
Seaplane and amphibious aircraft regulations:
Fire Island National Seashore, N.Y., 35070

**NOTICES**

Assateague Island National Seashore; assessment of alternatives; meeting, 35120
Authority delegations:
Abraham Lincoln Birthplace National Historic Site; Administrative Services Assistant, 22458
Alaska Area Office, Administrative Officer, et al., 11613
Apostle Islands National Lakeshore, Wis.; Administrative Officer, 38633
Big Thicket National Preserve; Administrative Officer, et al., 22458
Blue Ridge Parkway, Va. & N.C., Administrative Officer, et al., 7481
Boston National Historical Park, Procurement Specialist, 4691
Buffalo National River, Administrative Officer, et al., 35119
Cape Lookout National Seashore, N.C., Administrative Officer, 7480
Carlsbad Caverns and Guadalupe Mountains National Parks, N.Mex.; Administrative Officer, et al., 30364
Chickamauga & Chattanooga National Military Park, Ga., Administrative Officer, et al., 7481
Cuyahoga Valley National Recreation Area, Ohio, Administrative Officer, 15203
De Soto National Memorial, Fla., Administrative Services Assistant, et al.; contracts, 13102
Everglades National Park, Fla., Administrative Officer, et al., 21519
Fort McHenry National Monument, Md., Administrative Technician, 47617
Fort Pulaski National Monument, Ga., Administrative Services Assistant, 21519
Guilford Courthouse National Military Park, N.C., Administrative Services Assistant, 7480
Gulf Islands National Seashore, Fla. and Miss.; Administrative Officer et al., 35119
Hawaii Volcanoes National Park, Supervisory Administrative Technician, 40934
Hopewell Village National Historic Site, Administrative Assistant, et al., 44906
Hostels in National Park System; management policy, 44906
Hot Springs National Park, Ark.; Administrative Officer, et al., 30364
Midwest Region, Superintendents, 9378
Moores Creek National Military Park, Administrative Clerk, 22458
Mound City Group National Monument, Ohio; Administrative Technician, 30365
North Atlantic Region; Superintendents, et al., 57355
Ocmulgee National Monument, Ga., Administrative Services Assistant, 7480
Pipestone National Monument, Minn.; Administrative Technician, 35121
Point Reyes National Seashore; Administrative Officer and Procurement Assistant, 51727
Redwood National Park, Administrative Officer, et al., 4693
Rocky Mountain Region, Superintendents, et al., 4693
Shiloh National Military Park, Tenn., Administrative Services Technician, et al., 7481
Sleeping Bear Dunes National Lakeshore, Mich.; Purchasing Agent, 35122
Southern Arizona Group, Administrative Officer et al; contracts, 17407
Young Adult Conservation Corp., Ariz., Camp Director, et al., 30365
Young Adult Conservation Corps, Tex., Administrative Officer, et al.; contracts, 17407
Boundary establishment, descriptions, etc.:
Colorado National Monument, Colo., 3952
Fort Bowie National Historic Site, Ariz., 46083
Fossil Butte National Monument, 37232
Glacier National Park, 3628
Herbert Hoover National Historic Site, Iowa, 4692
Indiana Dunes National Lakeshore, Ind., 2240, 30365
Perry's Victory and International Peace Memorial, 36332, 43078
Point Reyes National Seashore, 17408
Shiloh National Military Park, 45923
Tuskegee Institute National Historic Site, 36332
Voyeurs National Park, Minn.; correction, 30365
Cape Hatteras National Seashore, N.C.; report on seashore management strategy; availability, 55287
Cape Hatteras National Seashore, power transmission line upgrading; hearing, 50254
Concession contracts, standard language; inquiry; extension of time, 8596
Concession permits, etc.:
Anacostia Marina, Inc., 30903
Badlands National Monument, 34217
Blue Ridge Parkway, 52551
C. & O. Canal, 31992
Canyon de Chelly National Monument, 36005
Cape Hatteras National Seashore, 27250
Curecanti National Recreation Area, 9658
Death Valley National Monument, 8860
Dinosaur National Monument, 17408
Everglades National Park, 14748
Fort Dupont Park, 21740
Fort Sumter National Monument, 21381, 38747
Gateway National Recreation Area, 19301
Glacier National Park, 19302, 27251
Glen Canyon National Recreation Area, 35557
Golden Gate National Recreation Area, 49370
Grand Teton National Park, 1409, 7481
Great Smoky Mountains National Park, 35120, 41439
Katmai National Monument, 27251
Mesa Verde National Park, 20062
Natchez Trace Parkway, 40934
Petrified Forest National Monument, 14364
Rough Canyon Marina Inc., 58433
Statue of Liberty National Monument, 56281
Valley Forge National Historical Park, 39189
Yosemite National Park, 7482, 43078
Desert National Scenic Trail feasibility study; meetings, 43569
Environmental statements; availability, etc.:
Big Bend National Park, Tex., 17407, 35121
Big Thicket National Preserve, Tex., 4691
Biscayne National Monument, Fla., 3444, 57355
Buffalo National River, Ark., 57355
Cape Lookout National Seashore, N.C., 14747, 38633
Carl Sandburg Home National Historic Site, N.C., 35120
Everglades National Park, Fla., 2240, 27251
Franklin Delano Roosevelt Memorial, West Potomac Park, D.C., 43077
Gateway National Recreation Area; management plan, 14143
Grand Canyon National Park, Colorado River management plan, Ariz., 799
Gulf Islands National Seashore, Fla. and Miss., 19925, 37496
Harpers Ferry National Historical Park, W. Va., 43077
Mount Rushmore National Memorial, S. Dak., 50254
Natchez Trace Parkway, Tenn., Ala., and Miss., 9659, 27906
North Cascades National Park Service Complex; Pacific Crest Trail, rerouting, 40324
Obed Wild and Scenic River, Tenn., 49058
Pine Creek State and National Scenic River, Pa., 34546
Salinas National Monument, N. Mex., 35121
Scotts Bluff National Monument, Nebr., 7482
Sleeping Bear Dunes National Lakeshore, Mich., 9378
Tuskegee Institute National Historic Site, Ala., 42821
Virgin Islands National Park, V.I., 35121
Voyageurs National Park, Minn.; meeting, 47301
Yosemite National Park, Calif., 43569

Youghiogheny State and National Wild and Scenic River, Pa. and Md., 27906, 46588
Floodplain management and wetlands protection; procedures; inquiry, 40323
Historic Places National Register; additions, deletions, etc., SEE Heritage Conservation and Recreation Service.
Jurisdiction, concurrent; U.S. and Okla.; Chickasaw National Recreation Area, Okla., 35120
Jurisdiction transfer from Forest Service; Ozark National Forest, 1520
Land acquisition policy; public hearings, 43773
Management and development plans:
Canyon de Chelly National Monument, Ariz.; headquarters area, 6341
Channel Islands National Monument, Calif.; workshops, 14364
Colorado River, Ariz.; meeting, 8595
Gateway National Recreation Area, 14143, 20062
Golden Spike National Historic Site, Utah, 40322
Grand Canyon National Park; Ariz. et al., 1846
Hot Springs National Park, Ark.; Bathhouse Row and vicinity, 57670
Indiana Dunes National Lakeshore; meeting, 799
John Day Fossil Beds National Monument, Oreg., 37232
Redwood National Park; meetings, 22458
San Juan Island National Historical Park, Wash., 35121
Yosemite National Park, Calif., 42821, 43569
Management policies, availability, 19302, 54144
Meetings:
Appalachian National Scenic Trail Advisory Council, 2240, 7481, 14363, 15203, 19301, 22459, 25195
Assateague Island National Seashore; assessment of alternatives, 35120
Big Cypress National Preserve, Fla., 54144
Boston National Historical Park Advisory Commission, 11869, 13102, 20061, 41439
Canaveral National Seashore Advisory Commission, 26145
Cape Cod National Seashore Advisory Commission, 34218, 47300, 59913
Chesapeake and Ohio Canal National Historical Park Commission, 3443, 11613, 13103, 28055, 43568, 57196
Cuyahoga Valley National Recreation Area Advisory Commission, 17407, 44905
Desert National Scenic Trail feasibility study, 43569
Fort Union Trading Post National Historic Site, 13103
Gateway National Recreation Area Advisory Commission, 4692
Golden Gate National Recreation Area Advisory Commission, 1409, 6168, 19301, 27905, 40321, 51453, 59913
Gulf Islands National Seashore Advisory Commission, 28056
Indiana Dunes National Lakeshore Advisory Commission, 13103, 27906, 43569
Lake Mead National Recreation Area; carrying capacity study, 1410
Midwest Regional Advisory Commission, 2772
National Capital Memorial Advisory Committee, 20062
National Park System Advisory Board, 13104, 40321
National Park System Advisory Board, History Areas Committee, 6168
National Park System Advisory Board, Oversight Committee, 6169
National Survey of Historic Sites and Buildings Consulting Committee, 4291
Ozark National Scenic Riverways Advisory Commission, 11869, 38948
Pacific Northwest Trail Study, 17408
Pictured Rocks National Lakeshore Advisory Commission, 13104, 40322
Sleeping Bear Dunes National Lakeshore Advisory Commission, 11614, 27616, 49370
Western Regional Advisory Committee, 46911, 51149
White House Preservation Committee, 43077
Yosemite National Park Draft General Management Plan and environmental statement, 42821
Mining plans of operation; availability, etc.:
Death Valley National Monument, 11869, 35752
Glen Canyon National Recreation Area, 4693
Monument establishment:
Salinas National Monument, N. Mex., 6342
Monuments, National, preserves, and primitive areas; review for class I redesignation, 15014
Program execution, inholding areas; land acquisition policy; hearings, 35752
Snowmobiles; management policy and meetings, 57352
Visitor transportation service; Mount Vernon, 28258
Wilderness designations:
Shenandoah National Park, Va., 39188

## NATIONAL RAILROAD PASSENGER CORPORATION

### NOTICES

Meetings; Sunshine Act, 2474, 5645, 5915, 7519, 8058, 11893, 16440, 22154, 26681, 31101, 37537, 42349, 43410, 49887, 56997

## NATIONAL SCIENCE FOUNDATION

### PROPOSED RULES

Conduct standards, financial interests from minor contracts; exemptions, 55802
Nondiscrimination:
Handicapped in federally-assisted programs, 16518

### NOTICES

Advisory committee reports; availability, 32903
Advisory committee review; inquiry, 5114
Appropriate technology program; forums, 35133
Bobcat, lynx and river otter management; meeting, 2673
Committees; establishment, renewals, terminations, etc.:
Alan T. Waterman Award Committee, 16555
Applied Science and Research Applications Policy Advisory Committee, 34219
Future Scientific Ocean Drilling Ad Hoc Advisory Group, 2672
Information Science and Technology Advisory Committee, 18801
International Programs Advisory Committee, 1157
National Science Foundation Advisory Council, 10651
Post-International Phase of Ocean Drilling (IPOD) Science Advisory Committee, 36336
Science Education Advisory Committee, 38474
Earthquake research, 1979 FY funds allocated, 34219
Handicapped in science program; proposal submission procedure, 45660
Impact of Federal wildlife regulations on systematics/ecology community, symposium, 3445
Improving Government regulations, 24216, 58636
Long-term ecological measurements conference, 3445
Meetings:
Advisory Council, 2777, 21085, 22251, 32200, 46609
Applied Science and Research Applications Policy Advisory Committee, 38474, 52565, 52566, 54308
Astronomical Sciences Advisory Committee, 15020
Astronomy Advisory Committee, 43397
Atmospheric Sciences Advisory Committee, 4699, 24151, 45658
Behavioral and Neural Sciences Advisory Committee, 2022, 2778, 3782, 3955, 4699, 5906, 6345, 10451, 13649, 17876, 19485, 19940, 20571, 21084, 40578, 41314, 45659, 45660, 46610, 47334, 60245
Bobcat, lynx and river otter management, 2673
Chemistry Advisory Committee, 17413, 47332
Earth Sciences Advisory Committee, 17413, 37015, 60243
Engineering Advisory Committee, 8869, 16228, 47334, 60246
Environmental Biology Advisory Committee, 1158, 2022, 12970, 15810, 32200, 41314, 43398, 46611, 60245
Federal Scientific and Technical Information Managers, 1158, 5115
Future Scientific Ocean Drilling Ad Hoc Advisory Group, 4698
Impact of Federal wildlife regulations on systematics/ecology community, symposium, 3445
International Decade of Ocean Exploration Ad Hoc Subcommittee, 26804
International Programs Advisory Committee, 54308
Long-term ecological measurements conference, 3445
Materials Research Advisory Committee, 1564, 7072, 8869, 17414, 26503, 47334, 49592, 55493
Mathematical and Computer Sciences Advisory Committee, 23662, 24152, 54309
Minority Programs in Science Education Advisory Committee, 21085, 54308, 60244

National Science Foundation Advisory Council, 3782, 12970, 20571
Northeastern regional forum, 10748
Nuclear Science Advisory Committee, DOE/NSF, 8212, 8868, 11619, 22796, 40578, 41316, 60244
Nuclear Science Advisory Committee, ERDA/NSF, 2672
Ocean Sciences Advisory Committee, 7072, 8869, 18801, 26804, 30625, 32903, 34219, 37015, 43397, 46609, 56299
Physics Advisory Committee, 5114, 8869, 12769, 13649, 15020, 16228, 17413, 42049, 54308
Physiology, Cellular and Molecular Biology Advisory Committee, 1563, 2021, 2777, 2778, 3445, 3782, 5907, 15810, 17876, 19484, 19940, 21085, 21086, 34219, 40578, 43398, 45659, 46610, 46611, 47333, 49592
Polar Programs Advisory Committee, 15810, 37016, 41315
Policy Research and Analysis and Science Resources Studies Advisory Committee, 19484, 30625, 55828
Public participation in NSF programs, policies, and priorities development, 15809
Public Service Science Residents and Interns, 60244
Regional Forums, National Science Board, 3956
Research Applications Policy Advisory Committee, 15020
Science and Society Advisory Committee, 6344, 22251, 26804, 40578, 52566
Science Education Advisory Committee, 2672, 12769, 14366, 15809, 19080, 40577
Science Education Research Workshop, 16228
Social Sciences Advisory Committee, 2777, 3957, 4699, 5115, 6344, 11620, 13649, 16227, 16228, 17414, 17876, 41315, 45659, 46610, 47333
Steering Committee Advisory Council, 4699, 22251
Two-Year College Science Education Needs Assessment Advisory Committee, 24152
Waterman, Alan T., Award Committee, 10451
Meetings; Sunshine Act, 1671, 2047, 3239, 7797, 9551, 15405, 19986, 24654, 33873, 39638, 41336, 50985
Organization and functions, 26504
Privacy Act; systems of records, 10651, 16556, 25502, 40082, 46609
Privacy Act; systems of records; annual publications, 53624
Public participation in NSF programs, policies, and priorities development; regional forums, 15809
Regional Forums, National Science Board; meetings, 3956, 10748
Regulatory agenda; semiannual, 58656
Reports, advisory committees; availability, 8868
Science and math instruction improvement program, joint NSF-NIE, 4292
Science education research; workshop, 16228
Science Resources Program; awards, etc., 1016
Science resources program; manpower, funding, and output analysis, 17876, 42049

## NATIONAL TECHNICAL INFORMATION SERVICE

### NOTICES

Improving Government regulations; inquiry, 23193
Inventions, Government-owned; availability for licensing, 2649, 2650, 2651, 2652, 4274, 7339, 7340, 7472, 8284, 10425, 11845, 12902, 13603, 15350, 15351, 17388, 18735, 18736, 21344, 22231, 24116, 24725, 24886, 25458, 26767, 28027, 29345, 30328, 31191, 32163, 34182, 34518, 35742, 37737, 38450, 39600, 39601, 40050, 41074, 42026, 43533, 43758, 43759, 46060, 46890, 46891, 50235, 50727, 50728, 51436, 51437, 52756, 52757, 52758, 53052, 53053, 53054, 53055, 53056, 55813, 55814, 58849, 59116, 59537, 60986

## NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

### NOTICES

Computer programs and data bases for predicting radio systems performance; catalogue information solicitation, 21713
Improving Government regulations; inquiry, 23190
Meetings:
Electromagnetic Radiation Management Advisory Council, 35374, 54678
Frequency Management Advisory Council, 22232, 52758, 60330
INMARSAT Preparatory Committee Working Group, 29162
Postal area, electronic communications policy; inquiry, 60183
Rural communities, assessment and telecommunications planning; positions, availability, 36130

## NATIONAL TRANSPORTATION POLICY STUDY COMMISSION

*See Transportation Policy Study, National Commission.*

## NATIONAL TRANSPORTATION SAFETY BOARD

### RULES

Accidents in surface transportation; hearings and reports, 37690
Air safety proceedings:
Stay of proceeding pending petition for exemption, 60473
Freedom of information:
Fee schedule, 44534
Railroad accident reporting requirements; damage estimates, 44536
Seal; design change, 36454

### PROPOSED RULES

Air safety proceedings:
Stay of proceeding pending petition for exemption, 37732
Railroad accident reporting requirements, 32441

### NOTICES

Aircraft accidents; investigation hearings, 17419, 20283, 34851, 49084, 51153
Meetings; Sunshine Act, 816, 1172, 1583, 1883, 2813, 3239, 3670, 4750, 5469, 5916, 7084, 7520, 8682, 9218, 9407, 9931, 10680, 11037, 12180, 13658, 14796, 15836, 16882, 17628, 18401, 18628, 19499, 20368, 21563, 23843, 24405, 25937, 26185, 27641, 28329, 28895, 30391, 31102, 31304, 31503, 32369, 32532, 35620, 37832, 38665, 38992, 39924, 40601, 41160, 42853, 44612, 46156, 48814, 52092, 52603, 54175, 56154, 58472, 59455
Pipeline accidents; investigation hearings, 41103
Privacy Act; systems of records; annual publication, 39941
Railroad derailments and hazardous material safe carriage; NTSB authority; hearing, 8601, 9544
Safety recommendations and accident reports; availability, responses, etc., 1017, 1850, 2780, 3633, 4471, 5604, 6847, 7492, 8599, 9543, 10990, 12134, 13442, 14555, 15504, 16822, 18073, 19306, 20284, 21520, 22465, 23770, 24916, 25888, 26805, 28263, 29195, 30148, 31247, 32475, 34220, 35563, 36533, 37776, 38959, 39870, 41101, 42826, 44575, 46089, 47017, 48742, 50062, 51150, 52307, 53514, 55021, 56112, 57358, 58434, 59557, 60676
Third party communications; policy statement, 20283

## NAVAJO AND HOPI INDIAN RELOCATION COMMISSION

### PROPOSED RULES

Commission operations and relocation procedures; eligibility for benefits, 59400
Property resale regulations, 46047

### NOTICES

Privacy Act; systems of records; annual publication, 59556

## NAVY DEPARTMENT

### RULES

Claims, personnel, 25425, 33241
Islands under Navy jurisdiction, public access:
Kahoolawe Island, Hawaii; entry regulations, 3706, 11815
Lights, special Naval vessels; additional station and signal lights; correction, 13878
Navigation:
Certifications and exemptions for certain vessels, 33709
Light waivers; variance from requirements; correction, 13878
USNS Powhatan; compliance with COLREGS, 49536
USS Belleau Wood; compliance with COLREGS, 29942
USS Birmingham; compliance with COLREGS, 36070
USS Cincinnati; compliance with COLREGS, 8257
USS Groton; compliance with COLREGS, 12681
USS New York City; compliance with COLREGS, 49537
Personnel:
Correction of Naval Records Board; decision availability, 2170

Naval Discharge Review Board; policy statement, 17356
Simplification of regulations; CFR Parts deleted, etc., 17355, 28475

NOTICES
"Complaints of Wrong and Reports of Wrong", index; availability internally, not published, 21030
Discharge Review System, regional hearings, 4278, 59420
Entry regulations; Kahoolawe Island, Hawaii, 785
Environmental statements; availability, etc.:
Coso geothermal development program, 57179
Kahoolawe Island, Hawaii; training; hearings, 10969, 12747, 14534
Midway Island; U.S. Naval Station and Naval Air Facility, 15354
Orote Point, Guam, Mariana Islands; ammunition port facility construction, hearings, 47994
FBM submarine support base, Kings Bay, Ga.; establishment, 4913
Islands under Navy jurisdiction, public access
Kahoolawe Island, Hawaii; entry regulations, 785
Meetings:
CNO Executive Panel Advisory Committee, 1379, 2205, 4278, 14534, 18602, 20835, 30851, 38741, 41256, 45431, 47605, 48681, 50731, 60988
Education and Training Advisory Board, 23629, 45432, 51700, 60988
Naval Academy, Board of Visitors, 32851, 45432
Naval History Advisory Committee, 45432, 46065
Naval Postgraduate School Superintendent, Board of Advisors, 45630
Naval Research Advisory Committee, 45432, 58404
Naval War College, Board of Advisors to President, 29977, 58226
Navy Resale System Advisory Committee, 17390, 45432, 52759
Naval Electronic Systems Engineering Centers, Pa. and Ill.; disestablishment, 37739
Patent licenses, exclusive:
Dyer, Frederick N., 25855
Westen Instrument Corp., 26473
Privacy Act; systems of records, 5472, 16367, 28532, 54124

## NEIGHBORHOOD REINVESTMENT NATIONAL CORPORATION

NOTICES
Meetings, 58875

## NEIGHBORHOODS, VOLUNTARY ASSOCIATIONS AND CONSUMER PROTECTION, OFFICE OF ASSISTANT SECRETARY

PROPOSED RULES
Energy conservation in new residential and commercial buildings; advance notice and meetings, 54951
Mobile home procedural and enforcement regulations:
Modular homes; exempt certification, 27494
Real estate settlement procedures; advance notice, 39701

## NEIGHBORHOODS NATIONAL COMMISSION

RULES
Freedom of information, 28199
Privacy Act; implementation, 28198

PROPOSED RULES
Freedom of information, 20512
Privacy Act; implementation, 20511

NOTICES
Meetings, 1849, 2776, 4698, 7747, 9208, 11774, 12811, 15807, 19726, 21520, 25209, 30937, 46086, 57357
Privacy Act; systems of records, 20568

## NEW COMMUNITY DEVELOPMENT CORPORATION

NOTICES
Environmental statements; availability, etc.:
Newfields, Ohio, 24144
Riverton New Community, N.Y., 11862

## NUCLEAR MATERIALS

*See Environmental Protection Agency.*
*Nuclear Regulatory Commission.*

## NUCLEAR REGULATORY COMMISSION

RULES
Byproduct material; export and import:
Export and import matters; editorial changes, 6923
Byproduct material, human uses:
Group licensing for medical uses; technetium 99m, human serum albumin microspheres for venography, 39748
Medical uses, application form, 37421, 47975
Medical uses, group licensing, 2167, 4972, 25994
Radiation surveys and source count of therapy patients, 55347
Byproduct material domestic licensing:
Export and import; editorial changes, 6921, 6922, 6923
Spark gap irradiators containing cobalt-60, license exemptions, 2387
Conduct standards:
Foreign gifts and decorations, 1929
Defects and noncompliance reporting:
Basic components, 48621
Region I Office; telephone change, 52202
Environmental protection; licensing and regulatory policy and procedures:
Environmental statement; distribution to EPA, 7210
Environmental statements and applications; distribution to local officials, 46293
Export and import; editorial changes, 6924
Uranium fuel cycle environmental effects; hearing, 970, 10544, 14641
Uranium fuel cycle impacts from spent fuel and reprocessing and radioactive waste management, 15616, 17803, 41373, 53027
Facilities and material licenses; fee schedule revised, 7218, 11815, 15408
Interpretations:
Facility license application review and hearing process, coordination with States, counties, etc.; CFR section removed, 17803
Nuclear facilities and materials; export and import:
Exemptions, licensing practices, hearings, etc., 6925
Nuclear uses, peaceful, exports of facilities and material for, 21643
Reporting and recordkeeping requirements, GAO approval, 18989
Nuclear material, special; domestic licensing:
Export and import; editorial changes, 6924
Licensee safeguards contingency plans, 11964, 14007, 43289
Organization and information:
Executive Director for Operations; rulemaking petitions, 28810
Reactor Safeguards Advisory Committee; functions, 30270
Region II Office; address change, 32741
Plants and materials, physical protection:
Export and import; editorial changes, 6925
Licensee safeguards contingency plans, 11964, 14007, 43289
Nuclear power reactors physical protection requirements; extension of implementation date, 34766
Region I Office; telephone change, 52202
Region II office, address change, 32741
Security personnel qualification training and equipment requirements, 37425, 38370, 41187, 45981
Practice rules:
Environmental statement distribution to EPA, 7210
Environmental statements and applications; distribution to local officials, 46293
Export and import; editorial changes, 6921
Facility license application review and hearing process, coordination with States, counties, etc., 17801
Hearings, construction permits for production or utilization facilities; 30 day notice, 30794
Orders to show cause; Director, Administration Office, 16446
Review of decisions and actions; time extension policy, 22346
Production and utilization facilities; domestic licensing:
Application updates; service of copies, 18539
Codes and standards for nuclear power plants, 17337, 56015
Combustible gas control systems, standards, 50163
Export and import; editorial changes, 6924
Licensee safeguards contingency plans, 11963, 14007, 43289
Multi-unit sites; construction safety integrity maintenance, 34765
Reporting requirements revocation and modification, 49775
Radiation protection standards:
Caution signs, labels, etc., 2167, 5357
Containers, empty; radioactive materials label removal, 22172
Personnel monitoring reports, 44829, 54081
Radon-222, exposure to; averaging over one year, 29270
Region I Office; telephone change, 52202, 56015

Region II Office; address change, 32741
Reporting requirements; property damage; elimination of duplication; correction, 2719
Radioactive material packaging:
Transport packages; quality assurance requirements; extension of time, 27174
Records, public:
Commission meeting transcript release; correction, 10
Commission meetings; prohibition on citation of statements, 37421
Commission meetings; use of sound recordings and cameras, 13055
Source material licensing:
Export and import; editorial changes, 6923
Inspections, 52202

PROPOSED RULES

Byproduct material, human uses:
Medical licenses; license conditions change, 11206
Medical therapy licensees; license conditions changes, 27995
Misadministration reporting requirements, 29297
Radioisotopes, medical uses regulation; policy statement, 11208
Byproduct material domestic licensing:
Decommissioning criteria for nuclear facilities, 10370, 19053, 34564, 38025
Discontinuance of activities; notification, 32431
Well-logging operations; safety requirements, 44547
Employees; notices, instructions, and reports of radiation dose to, 4865
Environmental protection; licensing and regulatory policy and procedures:
Uranium fuel cycle, environmental effects; oral presentations, 59515
Uranium fuel cycle, environmental survey, 39801, 43724
Exemptions and continued regulatory authority in agreement States:
Safeguard requirements; moderate and low strategic significance material, 22216, 25433
Safeguards on nuclear material, US/IAEA agreement; implementation, 22365, 54255
Independent spent fuel storage installations; licensing requirements, 46309
Nuclear facilities and materials, export and import:
Minor quantities, 19861, 30294
Nuclear material, special; domestic licensing:
Access to or control over, criteria and procedures; hearing, 14672, 18682, 29009
Decommissioning criteria for nuclear facilities, 10370, 19053, 34564, 38025
Discontinuance of activities; notification, 32431
Fuel cycle facilities, transportation, etc.; performance oriented safeguards, 35321
Inspection, resident; facilities and access, 19860
Physical security plan; hearing, 29009
Possession of special nuclear material in transit; license requirements, 22215
Safeguard requirements; moderate and low strategic significance material, 22216, 25433
Safeguards on nuclear material, US/IAEA agreement; implementation, 22365, 54255
Well-logging operations; safety requirements, 44547
Nuclear material, special, unclassified; eligibility for access to or control over, 14672, 18682
Nuclear powerplants, licensing; inquiry, 58377, 59091
Plants and materials, physical protection:
Environmental statement of transportation, 3368, 6095
Fuel cycle facilities, transportation, etc.; performance oriented safeguards, 35321
Safeguard requirements; moderate and low strategic significance material, 22216, 25433
Practice rules:
Antitrust review procedures, 17830
Rulemaking petitions, filing and processing, 18195
Procurement, 3288
Production and utilization facilities; domestic licensing:
Access to or control over restricted data, criteria and procedures, 18682
Antitrust review procedures, 17830
Codes and standards for nuclear power plants, 4050, 58825
Decommissioning criteria for nuclear facilities, 10370, 19053, 34564, 38025
Emergency core cooling systems for light-water-cooled nuclear powerplants; acceptance criteria; advance notice, 57157
Emergency plans, 37473, 47978
Financial qualifications requirement, 22373
Inspection, resident; facilities and access, 19860
Physical security plan; hearing, 14672, 29009
Safeguards on nuclear material, US/IAEA agreement; implementation, 22365, 54255
Radiation protection standards:
Licensee requirements to control total occupational radiation dose of individuals, 4865
Radionuclides; burial of small quantities, 56677
Radioactive material packaging:
Environmental statement on transportation, 3368, 6095
Radioactive wastes, low-level; management and disposal by shallow land burial; advance notice, 49811
Radiography and radiation safety requirements for radiographic operations, licenses:
Overexposure rate reduction, etc., 12715
Radiographic exposure devices, design; inquiry, 12718
Reactor site criteria; seismic and geological; reassessment of current criteria; inquiry, 2729
Safeguards on nuclear material, US/IAEA agreement; implementation; supplemental documents and extension of time, 54255
Souce material domestic licensing:
Decommissioning criteria for nuclear facilities, 10370, 19053, 34564, 38025
Discontinuance of activities; notification, 32431
Safeguards on nuclear material, US/IAEA agreement; implementation, 22365, 54255

NOTICES

Abnormal occurrence reports:
Containment integrity loss, 60350
Fuel assembly control rod guide tube integrity, 27263
Insulation failures in containment electrical penetrations, 3322
Overexposure of radiographer's hand, 1158
Overexposure of two radiation protection technicians, 26621
Primary coolant boundary in boiling water reactor, degradation, 35134
Eleventh report to Congress, 15372
Twelfth report to Congress, 30625
Thirteenth report to Congress, 45926
Advisory committee review; inquiry, 12402
Alarm systems, interior intrusion; report availability, 9665
Anticipated transients without reactor scram, information meeting, 12972
Biological effects of ionizing radiation; BEIRMOD, computer program for calculating effects; report availability, 25749
Camera coverage of hearings; policy statement, 4294
Committees; establishment, renewals, terminations, etc.:
Risk Assessment Review Group, 803, 28263
Differing professional opinions, survey; inquiry, 32473
Disposal facilities, radioactive waste storage; State participation, workshop, 57696
Domestic safeguard matters; supporting statement of need for research, studies, and technical assistance, 2464
Earthquake ground motion, strong; prediction methods; report availability, 9664
Environmental agreements for cooperation with listed States:
Indiana, 61053
New York, 19485
South Carolina, 19485
Virginia, 19485
Washington, 43774
Environmental Standard Review Plans; availability of draft; inquiry, 1159
Environmental statements; availability, etc.:
Allens Creek Nuclear Generating Station, 38958
Babcock & Wilcox Commercial Nuclear Fuel Plant, 38958
Commonwealth Edison Co., 25504, 52790
Consumers Power Co., 5603
Detroit Edison Co., 30626
Duke Power Co., 50764
Exxon Minerals Co., 22796
Exxon Minerals Co.; Highland Uranium Solution Mining Project, Wyo., 58660
Fuel, spent light water power reactor; handling and storage, 12402, 19305
Georgia Power Co., 11289
Gulf States Utilities Co., 31997
Houston Lighting & Power Co., 8307
Offshore Power Systems, floating nuclear power plants, 10989, 20283, 22111, 30147
Omaha Public Power District, 11289
Oxide fuels, mixed; decision memorandum, 20575
San Diego Gas & Electric Co., 4891, 50766
Southern California Edison Co. et al., 57200

Tennessee Valley Authority, 25210, 46086
United Nuclear Corp., 18366
White Mesa Uranium Project, Utah, 59935
Wyoming Mineral Corp., 19488
Export of high enriched uranium to certain European countries, inquiry; correction, 2250
Final liquid pathway generic study, availability, 9890
Floodplains management, 46499
Fuel cycle facilities, status report; availability, 21087
Generic requirements for light water nuclear power plant fire protection, 2250
Geologic repositories for high-level radioactive solid wastes, licensing procedures; policy statement, 53869
High-level radioactive solid waste forms; conference, 17882
Improving Government regulations; inquiry, 34358
International Atomic Energy Agency codes of practice and safety guides; availability of drafts, 46, 7490, 8875, 9210, 13931, 21385, 21956, 25750, 27618, 27619, 37247, 38959, 47618, 56107, 58661, 60353
International Atomic Energy Agency manual; availability of drafts, 19305
Issuances, semiannual hard bound volume; availability, 10452, 28262, 52791
License applications, domestic; open meetings; staff policy, 28058
Licensing, nuclear power plant; improvement recommendations; policy statement, 49082
Light water nuclear power plants; planning basis for development of State and local government radiological emergency response plans; task force report, 58658
Material control and accounting; report availability, 19083
Meetings:
Anticipated transients without scram; nuclear reactor regulation information, 12972
Disposal facilities, radioactive waste storage; State participation, 57696
Generic requirements for light water nuclear power plant fire protection, 2250
High-Level Radioactive Solid Waste Forms, 17882
Ionizing radiation, low level, biological effects, 9395
License applications, domestic; staff policy, 28058
Light water nuclear power plant fire protection, generic requirements, 8043
Medical Uses of Isotopes Advisory Committee, 50975
Nuclear facilities, decommissioning policy; State workshops, 34564
Radionuclides in urban environs, transport of, 29864
Reactor Safeguards Advisory Committee, 1564, 1565, 1853, 2465, 2466, 2673, 2957, 3185, 3445, 4293, 5119, 5442, 5443, 5446, 6665, 7274, 7382, 7747, 8870, 9394, 9395, 10652, 11290, 11775, 11877, 12770, 14777, 16229, 16434, 16435, 16560, 16575, 17558, 17877, 18365, 18805, 19081, 19303, 19729, 20282, 20283, 20571, 21086, 21383, 21384, 22107, 22259, 22260, 23037, 23768, 24635, 25389, 25503, 25751, 26161, 26509, 26623, 27617, 27936, 28061, 28262, 28588, 28867, 29043, 29193, 29385, 29386, 29863, 29864, 30001, 30376, 30630, 30937, 31072, 32337, 32472, 32906, 33353, 33986, 35561, 35762, 36151, 37244, 37245, 37501, 37775, 38747, 38748, 40330, 40579, 41316, 42049, 42050, 42314, 42825, 43591, 44574, 45926, 46611, 47335, 47802, 47803, 48087, 49080, 49861, 50763, 50975, 52303, 52566, 54146, 54147, 54309, 54706, 59182, 59183, 59447, 59448, 59933, 61053
Reactors, non-power; safeguards requirements, 36532
Reactors, nuclear power; physical protection against industrial sabotage, 13111
Regional State Liaison Officers, 20879
Risk Assessment Review Group, 2779, 7274, 11290, 19083, 21958, 34567, 38477
State Liaison Officers, Region II, 52070, 55020
Meetings; Sunshine Act, 60, 1047, 1172, 1432, 1671, 1884, 2274, 2474, 2813, 3011, 3473, 3670, 3990, 4317, 4915, 5469, 6196, 6717, 6903, 7084, 7294, 7394, 7797, 8225, 8922, 10469, 10790, 11785, 12181, 12813, 13658, 13967, 14599, 14796, 15554, 16258, 16259, 16646, 17445, 17628, 17629, 17907, 18831, 19104, 19330, 19754, 20368, 21106, 21977, 22154, 23086, 23675, 23843, 24170, 24405, 24654, 24791, 25226, 25227, 25406, 25407, 25771, 25937, 26362, 26531, 26880, 27641, 28895, 28896, 29248, 30027, 30186, 30391, 30645, 30981, 31504, 32026, 33373, 33874, 34024, 34266, 35431, 36339, 37537, 38505, 38784, 38785, 39215, 39479, 39480, 39638, 39925, 40102, 40601, 41160, 42101, 43617, 43618, 45688, 45944, 46627, 47077, 48098, 50283, 50799, 51505, 52092, 53103, 53568, 53897, 55311, 55563, 56154, 56758, 57222, 57420, 57719, 58144, 58472, 59244, 59455, 60715, 60716
Nuclear facilities, decommissioning policy; State workshops, 34564
Nuclear facility sites; early site review, procedures and technical options; draft availability, 10988
Nuclear non-proliferation; establishment of procedures, 25326
Nuclear power plants, resolution of generic issues; report to Congress, 1565
Nuclear powerplants, standardization; program changes; availability, 38954
Nuclear waste management goals; report availability, 20879, 28868
Occupational Radiation Exposure at NRC Licensed Facilities 1975; report availability, 13117
Oxide fuels, mixed:
Decision memorandum, 20575
Safeguard domestic industry against hypothetical threat; report availability, 20575, 23665
Peak acceleration, seismic intensity, and other physical parameters; correlation; analysis; report availability, 7075
Petitions for review of decisions or actions by Atomic Safety and Licensing Appeals Boards; extension of time for consideration, 11876
Privacy Act; systems of records, 29635, 52305
Privacy Act; systems of records; annual publication, 35806
Production and utilization facilities, licensing:
Health cost figures reduction; low level radiation exposure; hearing denied, 22253
Radioisotopes licensing; regional program, 4891, 53072
Reactors, non-power; safeguards requirements; meeting, 36532
Regulatory guides; issuance and availability, 2024, 2248, 2779, 3323, 4470, 5445, 7379, 8047, 8598, 8599, 10654, 10988, 11621, 12972, 12973, 14180, 14552, 14779, 15813, 16434, 16560, 16821, 17417, 17878, 19943, 20882, 21386, 22109, 23664, 24638, 28060, 29193, 32203, 32474, 34848, 35135, 35136, 35762, 36526, 37018, 38140, 42320, 43400, 44575, 47619, 51732, 52069, 53072, 53514, 54311, 55020, 55495, 56109, 56958, 56959, 58234, 61059
Rulemaking petitions:
Boston Edison Co. et al., 9542
Citizens United for Responsible Energy, 3448
Connecticut Citizen Action Group, et al.; denied, 16556
Connecticut Citizen Action Group et al., 4466
Honicker, Jeannine, 39614
KMC, Inc., et al., 29635
Nachreiner, R.F., 32906
New Hampshire, 56110
Non Destructive Testing Management Association et al., 25749, 34563, 41100
Ohmart Corp; withdrawal, 28260
Pan American World Airways, Inc., 56108
Union of Concerned Scientists, 16561, 27935
Rulemaking petitions; issuance of quarterly report; availability, 5116, 18365, 32338, 50976
Safety analysis reports, safety evaluation reports; availability, etc.:
Babcock & Wilcox Co., 25747
Ebasco Services, Inc., 5907
Fluor Pioneer, Inc., 3447
Gilbert Associates, Inc. et al., 41100
New England Power Co. et al., 25748
Ohio Edison Co. et al., 31247
Toledo Edison Co. et al., 31247
Security, nuclear power reactors; physical protection against industrial sabotage; meeting, 13111
Standard review plan; issuance and availability, 47, 2248, 8045, 8875, 9395, 9664, 9893, 10452, 10989, 11291, 12131, 12132, 13113, 13114, 13115, 13116, 13933, 13934, 13935, 13936, 14181, 14552, 14553, 14779, 14780, 15375, 15376, 16560, 16821, 16822, 17558, 17884, 17885, 19944, 19945, 21386, 21387, 22110, 22111, 25887, 27265, 27266, 29384, 31074, 32203, 32474, 34566, 35136, 38477, 40940, 47619, 52306, 54149, 56110, 57695, 58234
Topical report; issuance and availability, 26510, 52070, 55020
Transportation terminals; radioactive materials handlers, instructional booklets and posters for; availability, 31073
Uranium mill licensing, environmental impact assessments; technical assistance to States, 17879
Waste disposal classification system; development, specialized notice lists, 36722

*Applications, etc.:*
Alabama Power Co., 7488, 15373, 22251, 54147, 55018
Arizona Public Service Co. et al., 18802, 19727, 19729, 25746, 30629, 31996, 33353, 34847, 43398, 51730, 54148, 54705, 55829, 57198, 57694, 58234, 61055
Arkansas Power & Light Co., 10984, 12970, 13928, 18363, 18615, 19941, 31074, 32473, 36524, 36525, 40083, 40580, 45927, 45928, 48088, 49372, 51730, 57199, 57693, 58657
Atlantic Research Corp., 3634, 17414
Babcock & Wilcox Co., 3782, 17877, 50763
Baltimore Gas & Electric Co., 2025, 2244, 5447, 12402, 12971, 14551, 16559, 30146, 37016, 50763, 52066
Bertell, Rosalie, 37018
Boston Edison Co. et al., 5604, 6847, 7489, 8213, 8597, 9889, 11875, 13105, 18615, 27932, 30938, 31246, 38475, 43399
C.F. Braun & Co., 42315
Carolina Power & Light Co., 1411, 1565, 2025, 2245, 4465, 7072, 10652, 13105, 15373, 17414, 28261, 41317, 42315, 57197, 57198, 58659, 59933
Carpenter Tech. Corp. et al., 48088
Carter-Wallace, Inc., 45
Chem-Nuclear Systems, Inc., 5442
Cincinnati Gas & Electric Co. et al., 46911
Cleveland Electric Illuminating Co., 3634
Comanche Peak Steam Electric Station, 58234
Commonwealth Edison Co. et al., 2026, 5116, 5444, 7489, 8043, 9208, 9662, 10985, 13106, 13107, 13929, 15374, 17415, 18364, 19304, 20063, 21955, 22107, 24387, 25504, 25749, 27618, 30938, 35763, 37245, 38475, 39869, 42316, 43774, 46089, 52065, 53070, 54310, 55018, 57696, 58659, 59449, 61052, 61055
Connecticut Yankee Atomic Power Co., 8044, 9890, 25503, 33846, 49372, 52065
Consolidated Edison Co. of New York, Inc., 7380, 10985, 20571, 22108, 24636, 33846, 50763, 53070
Consumers Power Co., 2027, 2245, 3185, 5115, 5444, 5603, 6345, 7490, 8870, 9208, 9890, 10986, 11287, 11288, 11875, 15811, 16432, 16819, 17415, 17882, 18802, 19304, 23662, 25748, 25885, 26622, 37016, 41317, 42316, 43775, 45928, 48089, 50764, 52066, 54148, 55493, 55495
Cornell University, 51882
Dairyland Power Cooperative, 2245, 10653, 11288, 11620, 15021, 21955, 22462, 27264, 28261, 30939, 34564, 37017, 40580, 46911, 46912, 50764
Delmarva Power & Light Co., 52303
Detroit Edison Co., Inc., et al., 8212, 14778, 15021, 17415, 20063, 30626, 31246, 40327, 40580, 49081, 54148
Duke Power Co. et al., 2022, 2027, 4467, 7380, 8044, 9209, 9662, 13929, 17877, 17878, 19082, 20572, 30146, 31074, 31076, 31246, 32201, 32905, 36151, 37246, 38475, 38647, 39197, 39199, 39464, 45482, 50764, 52067, 52303, 59933, 61055, 61056, 61057
Duquesne Light Co. et al., 4467, 5117, 23663, 23664, 25390, 25748, 36007
Edlow International Co. et al., 22464, 37501, 50765, 55494, 58234
Energy Fuels Nuclear, Inc., 25390
Ente Nazionale Per L'Energia Elettrica, 24387
Exxon Nuclear Corp. et al., 30145, 30937
Florida Power Corp. et al., 2778, 2958, 5117, 6345, 15208, 25885, 34565, 41318
Florida Power & Light Co., 1159, 1411, 2023, 2246, 2958, 4890, 5117, 6346, 7075, 8213, 8598, 10986, 13929, 13930, 14778, 16435, 17416, 22252, 24387, 24388, 25390, 25886, 35406, 37017, 52069, 52304, 52790, 53070, 55494, 61058
Fluor-Pioneer, Inc., 42317
General Atomic Co. et al., 36525, 56300
General Electric Co., 4467, 6346, 8598, 59450
Georgia Power Co. et al., 2023, 2246, 5444, 9662, 13108, 15811, 16433, 16559, 20063, 23665, 27265, 29383, 31247, 32201, 35764, 36007, 37017, 37018, 46912, 49373, 56107, 57695
Gulf States Utilities Co., 8871, 20572
Houston Lighting & Power Co. et al., 8871, 15811, 21956, 22253, 23666, 32338, 33968, 34565, 39612, 40327, 50765, 52069, 55018
Idaho State University, 48741
Illinois Power Co. et al., 13441, 14551, 15504, 16819, 37246, 45929
Indiana & Michigan Electric Co. et al., 45, 3185, 3957, 7748, 8044, 10987, 12131, 13930, 16433, 19942, 24388, 24389, 25209, 27933, 27934, 35561, 54149
Iowa Electric Light & Power Co. et al., 1411, 12971, 13108, 17883, 25390, 25503, 30627, 49373
Jersey Central Power & Light Co. et al., 6346, 7380, 7381, 8598, 9891, 13108, 13109, 18616, 28058, 40329, 55495, 57992
Long Island Lighting Co. et al., 5603, 6346, 21387
Maine Yankee Atomic Power Co., 1159, 2247, 3187, 6347, 15022, 19942, 22109, 28059, 39612, 39613
Metropolitan Edison Co. et al., 46, 1160, 2778, 3186, 3187, 7073, 7381, 9891, 10653, 10987, 11875, 13931, 18364, 20574, 22463, 23037, 23665, 24389, 24636, 25751, 37776, 38141, 39613, 40327, 46087, 49593, 56108, 58235, 59934
Midland Plant,- 55495
Mississippi Power & Light Co. et al., 32903
Nebraska Public Power District, 1566, 7073, 9663, 13109, 13650, 16433, 16820, 19942, 19943, 27934, 27935, 29193, 30627, 39197, 46912
New York State Electric & Gas Corp. et al., 7379, 8308, 9543, 10750, 32904, 36007, 46912
Niagara Mohawk Power Corp. et al., 1412, 4891, 9663, 12769, 13110, 15812, 21957, 28059, 34566, 51731, 51883
NL Industries et al., 58657
Northeast Nuclear Energy Co. et al., 5908, 9891, 11289, 11292, 11876, 12972, 13110, 17416, 17883, 18616, 18802, 22254, 28060, 28261, 31076, 31077, 45929, 46913, 47618, 58661, 60353
Northern States Power Co. et al., 3447, 3957, 4468, 7382, 9210, 9394, 13111, 14180, 17416, 24637, 27619, 28589, 29633, 32473, 43399, 51731, 52791, 54706, 57199
Northern States Power Co. of Minnesota et al., 801
Nuclear Engineering Co., Inc., 1160, 2023, 9892, 11290, 14778, 14781, 15374, 16820, 17418, 18617, 26161, 60354
Nuclear Fuel Services, Inc., 5445
Offshore Power Systems, 13932, 15813, 22255, 31246
Ohio Edison Co. et al., 12403
Omaha Public Power District, 2247, 3447, 3783, 5118, 7382, 10987, 40083, 58235, 58662, 59450
Oregon State University, 52305
Pacific Gas & Electric Co., 1161, 5445, 5603, 6347, 30627, 32201, 39198, 46913, 50766, 53071, 59934
Pennsylvania Power & Light Co. et al., 2465, 35406, 45482, 59450
Philadelphia Electric Co. et al., 46, 2024, 4468, 4469, 7490, 8045, 9663, 13111, 13112, 17878, 17884, 19306, 21387, 22256, 23664, 26622, 28589, 33970, 35763, 39869, 46913, 48089, 49374, 57200, 60354
Pittsburgh-Des Moines Steel Co., 59557
Plateau Resources, Ltd., 30628
Polytechnic Institute of New York, 802
Portland General Electric Co. et al., 2247, 3186, 5116, 9893, 11620, 12403, 12972, 13112, 13932, 14552, 16821, 17884, 18803, 21388, 23768, 24391, 24637, 29195, 29634, 30147, 33970, 34847, 35408, 37502, 48090, 52792, 53071
Power Authority of State of New York, 1016, 2024, 2958, 5118, 7074, 11621, 13113, 13932, 19488, 22257, 26509, 26622, 30148, 34220, 36008, 38476, 39464, 39869, 40580, 42317, 49082, 53072, 53513, 55018, 56109
Public Service Co. of Indiana, Inc., et al., 1656, 1854, 9211, 15375, 32201
Public Service Co. of New Hampshire et al., 9211, 19488, 25210, 26623, 27265, 29864, 39465, 40581, 42050, 43591, 60355
Public Service Co. of Oklahoma et al., 20583, 27265, 33971, 35762, 37502, 39198, 40940, 42317, 43399, 52306, 54310, 57200, 61058
Public Service Electric & Gas Co. et al., 802, 5118, 5119, 5443, 7491, 11876, 13932, 18803, 19943, 21388, 22257, 30148, 44574, 44575
Puget Sound Power & Light Co. et al., 2466, 7075, 21957, 25391, 56300, 61038
RMI Co. et al., 32337
Radiation Technology, Inc., 13933, 19306, 23037, 58662
Regional State Liason Officers, 41320
Rochester Gas & Electric Corp. et al., 7275, 10654, 11877, 14554, 15813, 20880, 58662, 59451
Sacramento Municipal Utility District, 8045, 19084, 25210, 33847, 36531, 38476, 49083, 57695, 59934, 60355
Samincorp, Inc., 27619
San Diego Gas & Electric Co. et al., 10987, 12133, 13442, 14555, 34567
South Carolina Electric & Gas Co. et al., 2248, 6347, 9893
Southern California Edison Co. et al., 1412, 2024, 2249, 6347, 8046, 13116, 13933, 16434, 18804, 30939, 36532, 46913, 53072, 56300, 58237
Stanford University, 3634
State University of New York at Buffalo, 8046

Stone & Webster Engineering Corp., 42318, 42319
Tennessee Valley Authority, 1412, 3186, 5119, 6348, 7074, 9893, 10654, 13117, 14181, 14554, 24750, 28060, 28262, 29194, 30628, 33971, 35408, 42319, 43775, 45483, 46086, 46914, 53514, 55496, 56111, 57200, 57696, 58663
Texas Utilities Generating Co. et al., 20583, 34850, 50767, 53073, 58237
Toledo Edison Co. et al., 9396, 10750, 13935, 25391, 27619, 30002, 38476, 42319, 45929, 51732
Transnuclear, Inc., et al., 26509, 29044, 39612, 43400, 45481, 45482, 52790, 56299, 60357
Union Electric Co., 21389, 25888, 35137, 36532, 47620, 56958
University of Delaware, 7491, 26510
University of Oklahoma, 53073
Vermont Yankee Nuclear Power Corp., 47, 1161, 2244, 3634, 6348, 27935, 34849, 48090, 49374
Virginia Electric & Power Co., 2959, 4470, 5445, 12404, 14780, 15376, 16822, 17417, 17418, 18805, 20881, 21957, 22258, 22465, 24638, 28590, 29384, 29634, 30148, 32202, 35561, 35562, 39465, 46088, 47620, 50976, 52070, 53074, 54707, 59451
Washington Public Power Supply System et al., 2249, 8214, 16559, 32338, 39614, 51732, 59451, 61059
Western Nuclear, Inc., 57696
Westinghouse Electric Corp., 4470, 18365, 36525, 50768, 54310
Wisconsin Electric Power Co. et al., 48, 3783, 7074, 9894, 11622, 14555, 20064, 21389, 22258, 22465, 26162, 29194, 34849
Wisconsin Public Service Corp. et al., 2249, 4471, 8047, 13933, 21390, 24391, 25211, 31077, 35563, 46088, 59557
Wyoming Mineral Corp., 46088
Yankee Atomic Electric Co., 9396, 9664, 13118, 17418, 17879, 25211, 25750, 36008, 42825, 49374, 56111, 57201, 60358

## OCCUPATIONAL INFORMATION COORDINATING NATIONAL COMMITTEE

### NOTICES

Information system; policies and grants, 1979 FY, 31115
Interagency agreements, 5348

## OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

### RULES

Agriculture health and safety standards:
Dust, cotton; exposure, 27434, 28474, 35036, 56894
Construction and health safety standards:
Ground-fault circuit protection, 47182
Health and safety standards:
Acrylonitrile (vinyl cyanide); emergency temporary occupational exposure standards; hearing, 2600
Acrylonitrile (vinyl cyanide); exposure, 45809
Air contaminants tables; CFR corrections, 57602
Arsenic, inorganic, exposure, 19624, 28472
Benzene, liquid mixtures; exposure, 27971
Benzene; occupational exposure, 5963, 13561
Construction; ground fault circuit protection, 47182
1, 2-Dibromo-3-chloropropane (DBCP), 11527
Dust, asbestos, vinyl chloride, etc.; technical changes, 28473
Dust, cotton; exposure, 27394, 27434, 28474, 35032, 56893, 56894
Dust, cotton; exposure; suspension of effective dates; request for comments, 39087
Employee exposure and medical records; preservation, 31020, 31330
General industry standards; selected revocations, 49744, 51759
Lead; exposure, 53007, 54354
Special industry standards; cooperage and laundry machinery and baking equipment revocations; correction, 51760
Special industry standards; selected revocations, 49764
Injuries and illnesses, recording and reporting; access to log by employees, 31329
Inspections, citations and proposed penalties; objections to inspection, 59839
State plans for development and enforcement of standards; suspension of action on State petitions, 11196, 14009
State plans for enforcement of standards:
California, 9806
Colorado, 25424
Connecticut, 51390
Federal program and evaluation changes, six-month period, 51761
Hawaii, 5821, 19851
Oregon, 36624
Tennessee, 20982, 20983, 20985, 20986
Wyoming, 25424, 34463

### PROPOSED RULES

Health and safety standards:
Acrylonitrile (vinyl cyanide), availability of environmental statement, 7669
Acrylonitrile (vinyl cyanide); occupational exposure standards, hearing, 2608
Benzene, liquid mixtures; exposure to, 12890, 14071, 18215
Cutaneous and eye hazards; inquiry, 22999
1,2-Dichloroethane; exposure; inquiry, 56910
Employee exposure and medical records, access, 31371, 46322
Epicholorohydrin; exposure; inquiry, 56907
Ethylene dibromide; occupational exposure; inquiry, 11227
General industry standards, selected; revocations; extension of time, 9830
Means of egress, hazardous materials, and fire protections, 60048
Pesticides; exposure to; inquiry, 54955
Special industry standards; cooperage and laundry machinery and bakery equipment; revocations, extension of time, 9831
Vinyl bromide; exposure, inquiry, 56908
State plans for enforcement of standards:
Indiana; extension of time, 4072
South Carolina, 4072, 17003
State standards applicable to State and local employees in States without approved private employee plans:
Connecticut, 32824
Toxic substances; identification and regulation:
Carcinogenic risk substances; extension of time and hearing rescheduled, 3729

### NOTICES

Applications, etc.:
Eastern Equipment & Engineering Co., 19938
Firestone Plastics Co., 53846
General Motors Corp. et al., 53847, 59927
Gerald D. Hines Interests, 50746
Interlake Stamping Corp., 11275
J. Ray McDermott & Co., Inc., 5081
Minnesota Mining & Manufacturing Co., 9887, 12392, 13648
Oceaneering International, Inc., 5080
Research-Cottrell, Inc., 50746
Santa Fe Engineering & Construction Co., 5082
Taylor Diving & Salvage Co., Inc., 5083
U.S. Steel Corp., 33834, 54306
West Co., 2945
Youngstown Sheet & Tube Co., 50749
Committees; establishment, renewals, terminations, etc.:
Construction Safety and Health Advisory Committee, 11274, 53849
Cutaneous Hazards Standards Advisory Committee, 10647
Occupational Safety and Health National Advisory Committee, 9380
Interagency Regulatory Liaison Group:
Testing standards and guidelines; inquiry, 1523, 1987
Work plans and meetings, 7174
Meetings:
Construction Safety and Health Advisory Committee, 3319, 14751, 23022, 28577, 32884, 53850
Cutaneous Hazards Standards Advisory Committee, 10647, 14551, 14752, 21747, 25490, 29363, 44917, 51864
Occupational Safety and Health Federal Advisory Council, 24150, 47302
Occupational Safety and Health National Advisory Committee, 2020, 7064, 11766, 15807, 24151
Meetings; Sunshine Act, 51897
State plans; development, enforcement, etc.:
Alaska, 31456, 57670
Arizona, 17066
California, 23023, 50745, 57671
Hawaii, 36150, 57671
Indiana, 5083
Kentucky, 57672
Maryland, 8197, 57673
Michigan, 31457
Minnesota, 5084
New Mexico, 51863
North Carolina, 23023
Oregon, 9888, 13648, 15806, 33834, 35125
Puerto Rico, 37233
South Carolina, 31457
Tennessee, 14164, 31458
Utah, 17066, 31458, 41305
Vermont, 19479, 31459, 36150
Virgin Islands, 31460
Virginia, 11274, 25491
Washington, 19480, 23024
Wyoming, 15806, 41305, 50750, 58124, 58125
Training, education, and related assistance capabilities development grant programs; scope and objectives, etc., 16140

## OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

**RULES**

Procedure rules:
Review process simplification and clarification, 4604

**PROPOSED RULES**

Procedure rules:
Simplified proceedings, briefs, etc., 36856, 46047, 53774

**NOTICES**

Meetings; Sunshine Act, 1432, 1672, 2047, 3341, 4317, 5131, 6196, 7798, 9551, 10680, 11893, 13659, 15231, 16258, 17628, 21792, 21978, 25772, 26682, 28895, 29888, 31304, 32369, 34024, 35160, 36339, 36586, 38665, 39925, 42101, 43617, 44966, 47078, 47812, 49604, 53568, 54351, 55838, 57420, 58256, 58704, 59244, 59970, 60250, 60367

## OCEANS AND ATMOSPHERE, NATIONAL ADVISORY COMMITTEE

**NOTICES**

Meetings, 3780, 8868, 11874, 19939, 24750, 26161, 29192, 35131, 39463, 45925, 51482, 56107

## OFFICE OF SCIENCE AND TECHNOLOGY POLICY

*See Science and Technology Policy Office.*

## OFFICE OF THE SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS

*See Trade Negotiations, Office of Special Representative.*

## OHIO RIVER BASIN COMMISSION

**NOTICES**

Comprehensive Coordinated Joint Plans; availability of reports:
Ohio Main Stem, 12973
Ohio River Basin, 45930, 61060

## OIL

*See Economic Regulatory Administration.*
*Geological Survey.*
*Land Management Bureau.*

## OVERSEAS PRIVATE INVESTMENT CORPORATION

**RULES**

Foreign corrupt practices; disqualification procedures, 36064

**NOTICES**

Authority delegations:
Insurance Department, Vice President, et al., 46612, 48745
Personnel Director et al., 51733
Meetings; Sunshine Act, 3670, 16882, 29055, 35620, 41161, 50124, 57420, 58704

## PACKERS AND STOCKYARDS ADMINISTRATION

**RULES**

Transfer of functions to Agricultural Marketing Service, 19351

**PROPOSED RULES**

Policy statements:
Rates and charges, 13488
Rates and charges; changes, notification, etc., 13488

**NOTICES**

Posting and deposting of stockyards:
Farmers & Ranchers Livestock Auction, Inc., Ark., et al., 3733, 18726
Huntsville Livestock Auction, Ark., et al., 5859
Madison Stockyards, Inc., et al., 1521
Montrose Auction Co., Colo., et al., 18727
Northwest Alabama Livestock Auction et al., 1521
Valley Livestock Auction Co., Colo., et al., 18726
Rates and charges:
Posted stockyards, hearings, 986
Sioux City Stock Yards, hearing, 15757

## PANAMA CANAL

**RULES**

Employment and compensation; exclusions; intelligence positions in Defense and Army Departments, 17941
Licensing of officers, 13380
Postage rates, international surface; increase, 25819
Privacy Act; implementation, 11577

**PROPOSED RULES**

Privacy Act; implementation, 58394

**NOTICES**

Privacy Act; systems of records; annual publication, 43641

## PAROLE BOARD

**NOTICES**

Meetings; Sunshine Act, 4317

## PAROLE COMMISSION

**RULES**

Prisoners, youth offenders, and juvenile delinquents; parole, release, etc.:
Administration of Commission, CFR section deleted, 4977
Appeals by prisoners denied parole, 4978
Appeals filed by prisoners; filing deadlines, 38821
Chairman of National Commissioners, definition, 22707
Forfeiture of statutory "good time"; consideration in parole decision, 38822
Immigration detainer; consideration in parole decision, 38822
Information concerning parolees, release, 38823
Paroling, recommitting, and supervising Federal prisoners, 17470, 22707
Sunshine Act; implementation, 4978

**PROPOSED RULES**

Prisoners, youth offenders, and juvenile delinquents; parole, release, etc.:
Appeals by prisoners denied parole, 5011
Federal prisoners, parole of, 42282
"Good time," statutory, forfeiture, 22747
Immigration detainer; parole decision, 22747
Offense severity examples and policy instruction, 46859, 55800, 58593
Parole hearings; initial, 41411
Youth Corrections Act, prisoners sentenced under, 56681

**NOTICES**

Meetings; Sunshine Act, 1583, 2274, 2275, 2687, 3342, 3671, 3991, 6716, 7798, 8058, 9932, 13485, 16440, 16646, 20086, 21794, 21795, 23086, 26531, 26880, 30391, 33874, 36198, 39639, 39925, 43084, 45944, 47360, 49887, 51751, 55563, 57420, 57421, 59970, 11298B

## PATENT AND TRADEMARK OFFICE

**RULES**

Patent cases:
Inventions, secrecy of; interference proceedings, 28479
Practice rules; interference proceedings, 28477, 57886
Practice rules; multiple dependent claims and drawing requirements, 4015
Practice rules; Patent Cooperation Treaty; implementation, 20460, 57886
Trademark cases:
Forms, 55395
Opposition notices and affidavits/declarations, section 8; late filed fees, 35482

**PROPOSED RULES**

Patent cases:
Forms; application oath or declaration requirements, 55417
Practice rules; advisory opinions on validity of patents, 59401, 60176
Practice rules; application oath or declaration requirements, 55417
Trademark cases:
Forms; withdrawn, 28524
Opposition notices and affidavits/declarations, Section 8; late filed fees, 4441
Practice rules; withdrawn, 28524

**NOTICES**

Improving Government regulations; inquiry, 23193
Meetings:
Trademark Affairs Public Advisory Committee, 17523
Records facilities; public use; enforcement procedures, 21345

## PENNSYLVANIA AVENUE DEVELOPMENT CORPORATION

**RULES**

Conduct standards, 48633, 60902
Relocation assistance and land acquisition, 22708, 24528, 57877

**NOTICES**

Environmental statements; availability, etc.:
National Archives and Records Service Annex, 55293
Improving Government regulations, 24213, 36336

Privacy Act; systems of records; annual publication, 39942

## PENSION AND WELFARE BENEFIT PROGRAMS OFFICE

**RULES**

Administration and enforcement:
Enforcement requests, 17471, 50175
Employee retirement income security; multiple employer vacation benefit plan payments, interpretative bulletin, 58565
Reporting and disclosure requirements:
Annual report summary, 10139, 14009, 41206
Table of contents and clarification, 35042

**PROPOSED RULES**

Employee benefit plans:
Minimum standards; seasonal industries; reopening of comment period, 7670
Retirement benefits; suspension during reemployment, 59098
Severance pay plan; definition, 10579
Fiduciary responsibility:
"Prudence rule," investment of plan assets, 17480, 27208
Reporting and disclosure requirements:
Annual report, summary, 38032
Plan description requirements, 54268, 60966

**NOTICES**

Committees; establishment, renewals, terminations, etc.:
Employee Welfare and Pension Benefit Plans Advisory Council, 37234
Employee benefit plans:
Actuarial information form, Schedule B; proposed revision, 43696, 52789
Prohibitions on transactions; exemption proceedings, applications, hearings, etc., 2029, 2968, 4731, 7746, 11773, 12401, 15826, 16437, 17067, 17091, 17561, 18354, 18359, 19481, 22799, 22800, 23024, 25492, 25513, 28578, 28599, 29391, 29863, 30371, 30383, 32196, 32909, 37298, 43593, 45657, 45664, 45666, 45667, 50255, 51880, 51889, 51890, 52552, 53874, 55005, 56305, 56306, 56308, 59915, 61061, 61063, 61064
Sponge rubber products pension plan; reporting and disclosure requirements; alternate compliance method, 20566, 27262
Employee protection program of Airline Deregulation Act of 1978; meetings, 58642
Meetings:
Employee protection program of Airline Deregulation Act of 1978, 58642
Employee Welfare and Pension Benefit Plans Advisory Council, 1141, 9393, 37234, 54306, 56958
Reporting and disclosure requirements:
Actuarial information (Schedule B); revision, 43697, 52789

## PENSION BENEFIT GUARANTY CORPORATION

**RULES**

Allocation of assets:
Mandatory employee contributions, 14012
Guaranteed benefits:
Mandatory employee contributions, 14011
Plan benefits valuation; rates and factors, 2721, 10560, 25337, 55241, 56894
Plan sufficiency and termination of sufficient plans; early retirement benefits, 1335

**PROPOSED RULES**

Assets allocation:
Mandatory employee contributions, 1358
Guaranteed benefits:
Mandatory employee contributions, 1358
Plan benefits valuation; rates and factors, 10580, 31043, 46868

**NOTICES**

Improving Government regulations, 22608, 58237, 59942
Privacy Act; systems of records, 23772, 34225
Privacy Act; systems of records; annual publication, 39943
Regulatory agenda; semiannual, 59942

## PENSION PLANS

*See Civil Service Commission.*
*Internal Revenue Service.*
*Labor Management Services Administration.*
*Pension and Welfare Benefit Programs Office.*
*Pension Benefit Guaranty Corporation.*
*Railroad Retirement Board.*
*Social Security Administration.*
*Universal Social Security Coverage Study.*
*Veterans Administration.*

## PESTICIDES

*See Environmental Protection Agency.*
*Food and Drug Administration.*

## PIPELINE SAFETY OPERATIONS OFFICE

*See Pipeline Safety Regulation Office.*

## PIPELINE SAFETY REGULATION OFFICE

**RULES**

Pipeline transportation of gas:
Corrosion control requirements; operational and maintenance inspections, 39389
Steel pipe, qualification and design, 18553, 27540
Thermoplastic pipelines design, 13880, 21462, 43308
Pipeline transportation of liquids:
Conversion of existing pipelines to liquid service, 6786
Steel pipe, qualification and design, 18553

**PROPOSED RULES**

Pipeline transportation of gas:
Accident prevention, recommendations by NTSB; withdrawn, 42772
Cathodically protected transmission lines; effectiveness testing requirements, 39401
Gathering line, definition; withdrawn, 42773
Leak reporting requirements, 24478, 24866, 29811, 30590
Plastic pipe, installation and joining, 49334
Pipeline transportation of liquids:
Hydrostatic testing; pipelines carrying highly volatile liquids, 52504
Operation, maintenance, and emergency procedures, 35513, 46051
Valve spacing; highly volatile liquids, 39402, 50006

**NOTICES**

Meetings:
Technical Pipeline Safety Standards Committee, 54155
Petitions for waiver; pipelines:
Algonquin Gas Transmission Co., 16842, 57362
Panhandle Eastern Pipeline Co., 21526

## PLANTS

*See Animal and Plant Health Inspection Service.*
*Fish and Wildlife Service.*

## POLLUTION

*See Air Quality National Commission.*
*Coast Guard.*
*Environmental Protection Agency.*
*Environmental Quality Council.*
*Federal Aviation Administration.*
*Federal Maritime Commission.*
*Occupational Safety and Health Administration.*

## POSTAL RATE COMMISSION

**RULES**

Practice rules:
Reports filing, periodic; financial forms, 24833

**NOTICES**

Improving Government regulations; inquiry, 29045
Mail classification schedule, 1978:
Carrier-route presorted mail; minimum height, 57205
Electronic computer subclass, 41441
Electronic mail, 48745
Express mail metro service, 58664
Parcel post, 41441, 48746
Third-class carrier route presort subclass, 41440
Third-class discount, 48748
Third-class rate structure, 60359
Mail classification schedule (1976), 8877, 25504, 47020
Meetings; Sunshine Act, 8922, 14599, 16645, 25529, 35431, 36032, 41336, 51750, 53103, 54351, 55563, 60715
Rates and fees, 1977 changes; oral argument, 10751, 11878
Rates and fees, 1978 changes; nonstandard mail surcharge, 19308, 24921
Rural delivery; route consolidation:
Gresham, S.C., Route No. 1; petition for appeal, 21749
Third-class mail, bulk rate; technical comments, availability, 36726
Visits to postal facilities, 4153, 8603, 34225, 38964, 40956, 43401, 49596, 50768, 54708, 58128

## POSTAL SERVICE

**RULES**

Information, release of:
Availability of records, 42250
Intellectual property rights other than patents; acquisition and management, 42249
International mail:
Express mail rates for Taiwan, Singapore, and West Germany, 60905

Publication 42; incorporation by reference extended, 22717
Organization and administration:
Associate Judicial Officer; rules of practice before the Board of Contract Appeals, 60275
Headquarters and field units, 29117
Postal property conduct; solicitation, vending, and debt collection prohibitions, 38825
Research and Technology Group, establishment, 41984
Philately:
Designs, philatelic; copyright, 29120
Sales and cancellations; policies and procedures, 53431
Postal Service Manual:
Address cards arranged in sequence of carrier delivery; mailing list services; extension of grace period, 7317
Book mailing by publishers and distributors; library rate, 56224
Books and sound recordings found loose in mail; disposition, 19043
Business reply mail, format, 21328
Business reply mail with postage affixed; handling, 1620
Delivery service policy, city, 45839
Domestic mail service, complaints, mail security, etc., 40812, 45838
Editorial and technical changes, packaging, etc., 25096
Incorporation by reference extended, 22717
Newspaper receptacles on rural mailboxes, 14018
Packaging; safe handling, 4991
Postal and post cards; requirements and restrictions, 51016
Second and third class mail; label use, 3118
Second class and controlled circulation publications; identification statement, 29944
Second class preparation requirements, 39583
Security of mail; delay, detention, or opening mail, etc., 14312
Ship letters; classification and rates, 51017
Third-class, bulk-rate presort requirements, 39996
Third-class bulk mailers, nonprofit; certifications, 28199, 30054
Third-class bulk rate, 48637
Third-class bulk rate; non-identical mailings, 32294
Privacy Act; implementation, 41391
Procurement of property and services:
Postal contracting manual; incorporation by reference extended, 22717

PROPOSED RULES
Intellectual property rights other than patents, acquisition and management, 29134
International mail:
Publication 42; express mail; rate changes, 26033
Postal Service Manual:
Books; fourth class library rate, 6972
Books and sound recordings found loose in mail; disposition, 6263
Business reply mail; use by Federal agencies, 35951, 38049
Citizens' rate mail; inquiry, 15165
Delivery service policy, city, 12044
Newspaper receptacles on rural mailboxes, 1966
Postal and post cards; requirements and restrictions, 6111
Refused mail, return to mailstream after delivery, 57925
Second-class bulk mailing, preparation, 57924
Second-class mail; lower per piece rate for regular rate and science of agriculture publications, 19689
Security of mail; delay, detention, or opening mail, etc.; Puerto Rico, 42768
Ship letters; classification and rates, 37205
Stamps; unauthorized designs, messages; overprinting, 39593
Third class rates, bulk mailers; attachments, 30579
Third-class mail, single-piece; required marking, 9831
Restrictions on private carriage of letters:
Enforcement of private express statutes, 60615
Suspensions of private express statutes, 60615

NOTICES
Environmental statements; availability, etc.:
Southeast incoming Mail Center, Braintree, Mass., 41442
Improving Government regulations; inquiry, 22587, 24212
Meetings:
Board of Governors, 23773
Meetings; Sunshine Act, 1583, 4176, 4177, 5916, 7520, 9218, 11037, 13163, 14796, 17628, 17629, 19499, 20368, 20369, 22518, 24405, 25407, 28084, 32369, 39215, 39216, 43813, 43814, 50986, 56154, 60716, 60717
Privacy Act; systems of records, 6849, 16229, 25893, 32478, 32479
Privacy Act, systems of records; annual publication, 40122
Private carriage of letters, restrictions; alternate procedures for postage payment, 50275
Rates and fees:
Environmental negative declaration, 40956, 40959, 40960, 42320
International express mail rates; additions, 56959
International increases, 15814, 23773, 31997
Rates and fees, 1978 changes, 23039, 27620
ZIP Code Directory; National:
Licensing of publishers, 21525

## PRESIDENT'S COMMISSION ON COAL INDUSTRY

*See Coal Industry, President's Commission.*

## PRESIDENT'S COMMISSION ON MENTAL HEALTH

*See Mental Health, President's Commission.*

## PRESIDENT'S COMMISSION ON WHITE HOUSE FELLOWSHIPS

*See White House Fellowships, President's Commission.*

## PRISONS BUREAU

PROPOSED RULES
Inmate discipline and special housing units, 34062
Institutional management, 30574

NOTICES
Meetings:
Corrections Advisory Council, 1015, 14748, 26620, 47617
National Institute of Corrections Advisory Board, 2244, 19470, 25884, 36520

## PROCUREMENT, FEDERAL

*See General Services Administration.*

## PUBLIC BUILDINGS SERVICE

RULES
Procurement, Federal:
Advertising; listing of subcontractors on construction contracts, 40227, 53440
Small business concerns, 55761
Small purchase procedures; negotiation, 37197, 50907

PROPOSED RULES
Procurement, Federal:
Solicitation of bids; listing of subcontractors requirement; withdrawn, 14323
Property management, Federal:
Smoking; prohibition in GSA controlled buildings, 40250, 46555

NOTICES
Architectural and Engineering Services Regional Public Advisory Panels Review; inquiry, 11857
Environmental statements under preparation, administrative actions list, 35106
Federal space exchange program, establishment, 33326
Property transfer; wildlife conservation:
Cornhusker Army Ammunition Plans; Grand Island, Nebr., 10978

## PUBLIC DEBT BUREAU

NOTICES
Improving Government regulations, 52320
Regulatory agenda; semiannual, 52320

## PUBLIC HEALTH SERVICE

*See also Alcohol, Drug Abuse, and Mental Health Administration.*
*Disease Control Center.*
*Food and Drug Administration.*
*Health Resources Administration.*
*Health Services Administration.*
*National Institutes of Health.*
*Saint Elizabeths Hospital.*

RULES
Coal miners, underground; medical examinations of; chest x-rays, 33715, 38830
Fellowships, internships, training:
National Research Service Awards; correction, 1498, 55763
Grants:
Abortions and related medical services, 4570, 4832, 18679, 31878
Alcohol abuse and alcoholism prevention, treatment, and rehabilitation services; alcohol research centers, National, 14276
Alcohol abuse and alcoholism prevention, treatment, and rehabilitation services and projects, 40391, 44850
Allied health personnel, advanced training; traineeships, 29784, 40863

Allied health personnel; traineeships in health or hospital administration and health policy analysis, 39385
Community health services, 5352
Denistry, residency training, 54931
Dental auxiliaries; training programs, 26013
Emergency medical services systems, 51533
Health professions schools; scholarships; first-year students of exceptional financial need, 37200
Health research facilities construction, etc.; area health education center programs; interim rule and inquiry, 55244
Health services research; evaluation and demonstration projects, 34472
Hospital and medical facilities, construction and equipment standards, 45739
Maternal and child health and crippled children's services, 21154
Migrant health services, 5353
Nurse training programs, advanced, 43416
Predoctoral, graduate, and faculty development educational programs in family medicine, 47694
Public health; CFR Part removed, 2878
Public health; graduate programs; development and expansion, 27838
Public health and allied health personnel; health administration graduate programs, training, 26444
Regional medical programs; CFR Part removed, 2878
Scientific peer review of research grant applications and research and development contract projects, 7864
State comprehensive health planning; removal of Subpart, 2878
Sterilizations in federally assisted programs, 52165
Teaching facilities, construction, etc.; health professions student loans, 52488
Teaching facilities construction, etc.; allied health professions training center quality improvement, etc.; removal of subparts, 2878
Teaching facilities construction, etc.; assurances required of schools of medicine applying for health professions capitation grants, 36443
Teaching facilities construction, etc.; educational assistance to individuals from disadvantaged backgrounds, 39381
Teaching facilities construction, etc.; nurse practitioner training programs, 27837
Teaching facilities construction, etc.; nursing special projects, 27956
Teaching facilities construction, etc.; U.S. citizen foreign medical students, 36631
Health maintenance organizations, 6021
Employees' health benefits plans, 17682
Enforcement and compliance procedures, 32255
Financial assistance, eligibility, 50183
Health manpower shortage areas; criteria for designation, 1587
Health planning, National guidelines, 13044
Health planning and resources development:
Health systems agencies; designation and funding, 1253
State health planning and development agencies; designation and funding, 10120
Indian health; contract health services, eligibility and requirements, 34654, 41214
Information availability; CFR Part removed, 2877
Narcotic addicts; CFR Part removed, 2877
National Health Service Corps:
Grants to assist entities with Corps personnel; CFR Subpart removed, 2877
Scholarship program, 43715
Occupational safety and health research, etc.:
Industrial sound level meter sets and gas detector tube units; certification; CFR Parts revoked, 33247

**PROPOSED RULES**

Coal miners, underground; chest x-rays, conditions for transfer to less dusty areas, 33762
Grants:
Allied health projects, 59530
Auxiliary dental team practice, multiple; training programs, 26074
Childhood immunization, urban rat control, and VD control programs, 27210
Consolidated grants to Pacific Island Territories and Virgin Islands; advance notice, 46871
Dental auxiliaries; training programs, 26071
Dentistry, residency training, 18217
Family planning services, 42020
Genetic diseases testing and counseling programs, 19537
Health advancement in coal and other mining, 56918
Health research facilities construction, etc.; nursing schools; support of educational programs, 4790
Health research facilities construction, etc.; nursing special project grants, 4784
Home health services; professionals and paraprofessionals, training, 26534
Lead-based paint poisoning prevention, 35073
Maternal and child health and crippled children's services; disclosure of ownership, etc., 34717
Multipurpose arthritis centers program; advance notice, 30583
Nurse training programs, advanced, 3344
Physician assistants; training programs, 26077
Predoctoral, graduate and faculty development educational programs in family medicine; hearings, 47698
Research projects; applicability, etc., 34507
Scholarship programs; tuition and other educational costs payment, 55261
Uniform Alcoholism and Intoxication Treatment Act, 47983
Health hazard evaluation requests, 56918
Health maintenance organizations, 11472, 12339
Organization and operation requirements, 40376
Health planning, National guidelines, 3056, 6272
Health planning and resources development:
Community service and provision of services for persons unable to pay, 49954, 55800
Health systems agencies; applications review, 19988, 24072
Health systems agencies; certification of need criteria, 11231, 21274
Health systems agencies; governing body requirements, 22858, 33764
Health systems agencies; reviews of appropriateness of existing services, 21274, 33764
State agencies; certification of need criteria, 11235, 21274
State agencies; reviews of appropriateness of existing services, 21274, 33764
National Health Service Corps:
Health manpower shortage areas; assignment of personnel to public or nonprofit private entities, 33265
Occupational safety and health research, etc.:
Investigations of places of employment, 56918
Noise dosimeter sets, personal, industrial head protective devices, and gas detector tube units, voluntary testing and certification; withdrawn, 33268
Quarantine, foreign; elimination of requirement for testing for bacillus anthracis in lather brushes, 27215

**NOTICES**

Committees; establishment, renewals, terminations, etc.:
Health Care Technology National Council, 59442
Health maintenance organizations; applications for financial assistance, 56103
Health maintenance organizations, qualified; list, 2451, 4115, 8858, 8859, 14908, 15013, 16423, 27903, 35552, 49854, 53501, 60336
Health maintenance organizations, qualified; revised service areas, 17060, 27245
Health Statistics National Center; policy statement, 34214
Human subjects, protection:
Psychosurgery; recommendations on, 53242
Improving Government regulations; inquiry, 23124
Meetings:
Health Maintenance Organizations, 27898
Advisory committees; June, 22786
Advisory committees; October, 45479, 47289
Advisory committees; November, 44570
Occupational health research studies; inquiry, 55469
Occupational safety and health field research projects; list, 42306
Organization, functions, and authority delegations:
Alcohol, Drug Abuse, and Mental Health Administration, 20562
Disease Control Center, 37491
Disease Control Center, Director; influenza immunization grant program, 55825
Food and Drug Administration, 1136
Health, Assistant Secretary, 9868, 29034
Health, Assistant Secretary for; health maintenance organizations, 51452
Health, Assistant Secretary for; Smoking and Health Office, 9868
Health, Office of Assistant Secretary for, et al., 14131, 16423, 33965, 42043
Health Resources Administration, 1137, 39437
Health Resources Administration, Administrator, 31238, 31239
Health Services Administration, 32334, 37764
Regional Health Administrators et al., 31238, 31239
Toxicology, National program; establishment, 53060

## RADIATION

*See Environmental Protection Agency.*
*Food and Drug Administration.*
*Hazardous Materials Regulation Office.*
*National Telecommunications and Information Administration.*
*Nuclear Regulatory Commission.*

## RAIL PUBLIC COUNSEL OFFICE

**NOTICES**

AMTRAK rail passenger services; assistance for participants in hearings, 27623, 29045

## RAILROAD RETIREMENT BOARD

**RULES**

Appeals within the Board, 56888
Employer and employee status; determinations and appeals, 56888
Hearings before the board; examiners, 56888
Privacy Act; implementation, 17468
Reports and information to be filed by employers, 56888

**NOTICES**

Improving Government regulations; inquiry, 22603
Meetings:
Actuarial Advisory Committee, 33849, 45483
Meetings; Sunshine Act, 61, 1173, 2687, 2814, 7521, 10789, 19104, 25226, 31304, 31305, 40102, 40350, 54175, 55563, 56337
Privacy Act; systems of records, 27267
Privacy Act; systems of records; annual publication, 43642
Railroad retirement supplemental annuity program; determination of quarterly rate of excise tax, 7750
Supplemental annuity program; determination of quarterly rate of excise tax, 23666, 38751, 55496
Unemployment insurance account; balance, 52310
Unemployment period determinations, 5121, 18078, 31252

## RAILROADS

*See Federal Railroad Administration.*
*Interstate Commerce Commission.*
*National Railroad Passenger Corporation.*
*Rail Public Counsel Office.*
*Railroad Retirement Board.*
*United States Railway Association.*

## RECLAMATION BUREAU

**RULES**

Cultural resources, identification and administration procedures, 46540
Teton Dam failure; claims for loss or damage, 11821
Teton flood victims, sale of replacement farm units to, 41397

**PROPOSED RULES**

Motor vehicle use, off-road; area designation procedure, etc., 37206, 41241
Teton Flood victims, sale of replacement of farm units to, 24072
Water conservation measures, Colorado River; implementation with Lower Basin contractors and others, 24715

**NOTICES**

Colorado River storage project; meeting, 21951
Contract negotiations:
Fremont-Madison irrigation district, Minidoka project, Idaho, 39863
Snipes Mountain irrigation district Yakima project, Wash.; repayment of emergency loan funds, 56943
Environmental statements; availability, etc.:
ANG Coal Gasification Co., N. Dak., 3540
Bonneville Unit, Central Utah Project, Utah, 34546
Colorado River Basin Salinity Control Project, 21381
Fryingpan-Arkansas Project, Fountain Valley Conduit, Colo., 48722
Garrison Diversion Unit, N. Dak., 5079, 8041
McGee Creek Project, Okla., 17544, 20564, 52776
North Loup Division, Neb., 43773
O'Neill Unit, Nebr., 26620
Paradox Valley Unit, Colorado River Basin Salinity Control Project, Colo., 21060
Pick-Sloan Missouri Basin Program, Nebr., 46587
Uintah Unit, Central Utah Project, Utah, 31992, 31993
Floodplains management and wetlands protection; draft procedures, 50391
Irrigation water use and management study; report availability, 30363
Land; sales and transfer:
San Juan National Forest, Colo.; USDA, 23658
Truckee River, Calif., 35398
Wapinita Project, Oreg., 28857, 39445
Meetings:
Colorado River Basin Salinity Control Advisory Council, 54004
Colorado River storage project, 21951
San Luis Unit, Central Valley Project, Calif., 29839
Motor vehicles, off-road, use on designated roads, trails, and open areas:
Agate and Emigrant Reservoirs, Rogue River Project, Oreg., 30363
Beulah Reservoir, Vale Project, Oreg., 39610
Bully Creek Reservoir, Vale Project, Oreg., 39610
Cascade Reservoir, Boise Project, Idaho, 44905
Potholes Reservoir, Columbia Basin Project, Wash., 30364
Warm Springs Reservoir, Vale Project, Oreg., 39610
San Luis Unit, Central Valley Project, Calif.; meetings, 29839
Water service and repayment contract negotiations; public participation procedures, 25195

## RECREATION

*See Fish and Wildlife Service.*
*Interior Department.*
*National Park Service.*

## REDEVELOPMENT LAND AGENCY

**RULES**

Obsolete CFR Chapter deleted, 8505

## REHABILITATION SERVICES ADMINISTRATION

*See Human Development Services Office.*

## RENEGOTIATION BOARD

**RULES**

Mandatory exemptions; foreign military sales contracts and subcontracts, 4014
Termination of renegotiation; coverage termination date, 35280

**PROPOSED RULES**

Business by segments, renegotiable; analysis, 2187, 10581
Excessive profits; principles and concepts for application of statutory factors; inquiry, 12039

**NOTICES**

Authority delegation:
Director, Office of Administration, 4700
Contractor's report and application for commercial exemption, standard forms; extension of time for filing, 30002, 35408, 35409
Improving Government regulations, 23197, 24212, 55293
Interest rates: excessive profits and refunds, 2784, 26511, 60361
Meetings; Sunshine Act, 1172, 1584, 1884, 2275, 3239, 3473, 3474, 3792, 3990, 4317, 4750, 4915, 5470, 7084, 7294, 7798, 9763, 9931, 11657, 12181, 12813, 12988, 15056, 18129, 18401, 18831, 19105, 19331, 19986, 21792, 22296, 24170, 24654, 25226, 25227, 25530, 25772, 25937, 26185, 26363, 27282, 28084, 28612, 29410, 29663, 30185, 30982, 31504, 35160, 35620, 36586, 37332, 37832, 38993, 39925, 40351, 41336, 42101, 43410, 43411, 43617, 45510, 46418, 47650, 47812, 49412, 50800, 51751, 52092, 52359, 52603, 53568, 54176, 57421, 57719, 58472, 59455, 60250, 61084, 11298B
Regulatory agenda; semiannual, 55296
Segmentation analysis, Administrative Letter No. 75-15; revoked, 2250

## RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION

**RULES**

Organization and functions:
Redesignation and technical amendments, 43306, 45366
Transportation Security Office; cargo security advisory standards, 43305

## REVENUE SHARING OFFICE

**RULES**

Fiscal assistance to State and local governments:
Antirecession fiscal assistance program; payment adjustment procedures; territorial governments, 9807
Auditing and evaluating; guidelines, 15627
Employee selection procedures, uniform guidelines, 40223
Nondiscrimination, reduction and withholding proceedings, etc., 31927

**PROPOSED RULES**

Employee selection procedures; uniform guidelines, 9320

Fiscal assistance to State and local governments:
Nondiscrimination on basis of handicap, 15735

NOTICES
Fiscal assistance to State and local governments:
Entitlement funds, computation, adjustment, etc., 14785, 28883, 51743, 56971

## RURAL ELECTRIFICATION ADMINISTRATION

RULES
Bulletins; revision list and summary lists, 20955, 35648
Electric borrowers:
Engineering service contracts (Bulletin 41-1), 41181

PROPOSED RULES
Accounting records, audit (Bulletin 185-1), 22043
Electric borrowers
AC transmission line designs; vertical clearances (Bulletin 62-1), 19856
Accounts, uniform system (Bulletin 181-1), 41215
Construction of generation facilities on limited liability basis; solicit contractors' proposals without REA approval (Bulletin 40-6), 26447
Data processing systems (Bulletin 107-1:407-1), 50188
Enclosures containing protective equipment with exposed energized parts (Specification U-7), 3718
Energy conservation and future service requirements (Bulletin 120-2), 45591
Insulator support brackets for narrow profile construction (Specification D-19), 38015
Loan criteria, supplemental (Bulletin 20-14), 22043
Loan policies and application procedures (Bulletin 20-2), 44864
Pedestals, secondary (Specification U-6), 3718
Pole top pins (Specification D-3), 38014
Power supply surveys (Bulletin 111-3), 3717
System review and evaluation (Bulletin 161-5), 29009
Transformer enclosures, sectionalizing and singlephase (Specification U-4), 3719
Wholesale power and energy, etc. (Bulletin 111-1), 36106
Floodplains management and wetlands protecton procedures (Bulletin 20-21:320-21), 38585
Nondiscrimination among beneficiaries of REA programs; Bulletin 20-19 revision, 3718, 10571
Telephone borrowers:
Aerial and underground telephone cable, direct burial telephone cable, filled telephone cables, and filled buried wire (Specifications PE-22, 23, 39, 54), 56244
Anodes, zinc and magnesium sacrificial (Specifications DT-9 and DT-10), 16986
Cable shield bonding connectors (Specifications PE-33; Bulletin 345-65), 21005
Cables, aerial and underground (Specification PE-22; Bulletin 345-13), 21004
Cables, direct burial (Air Core) (Specification PE-23; Bulletin 345-14), 24064
Cables, inside wiring and switchboard (Specifications PE-71, PE-72), 3284
Cables and filled buried wire (Bulletins 345-13, 345-14, 345-67, 345-70; Specifications PE-22, PE-23, PE-39, PE-54), 11
Carbon arresters and protectors (Bulletin 345-78; Specification PE-78), 1098
Central office equipment contract; liquidated damages (Bulletin 384-3), 19857
Cords, flat oval telephone (Specification PE-75), 22985
Dams, significant and high hazard potential; design review (Bulletin 41-1), 30806
Digital, stored program controlled central office equipment, general specification Form 522 (Bulletin 384-3), 25138
Drop wire, parallel conductor (Bulletin 345-36; Specification PE-7), 12
Electronic equipment housings (Bulletin 345-79; Specification PE-69), 12869
Foreign materials and equipment granted technical acceptance subject to "Buy American" requirement (Bulletin 344-2), 35721
Improved 500 type sets (Specification PE-41; Bulletin 345-74), 22985
Modular set hardware (Specification PE-76; Bulletin 345-81), 28510
Payment, final; amount withheld; change from 10 per cent to 25 per cent (Bulletin 384-3), 32140
Polyethylene raw material (Specification PE-200; Bulletin 345-21), 21005
Special equipment contract; liquidated damages (Bulletin 385-4), 19857
Subscriber line concentrators, performance specification (Bulletin 385-4), 16986
Voice frequency loading coils, 40036

NOTICES
Energy conservation policy development, inquiry, 21708
Environmental statements; availability, etc.:
Alabama Electric Cooperative, 56252
Arkansas Electric Cooperative Corp., 25158, 29821
Associated Electric Cooperative, Inc. et al., 7678, 15173, 46354
Basin Electric Power Cooperative, 5860, 20522
Big Rivers Electric Corp., 40046
Brazos Electric Power Cooperative, Inc., 49554
Cajun Electric Power Cooperative, Inc., 39163
Chugach Electric Association, Inc., 4663
Colorado-Ute Electric Association, Inc., 35737
Dairyland Power Cooperative et al., 9834, 21027
East Kentucky Power Coop., 52755
Kansas Electric Power Cooperative, Inc., 53783
Lee County Electric Cooperative, 8819, 58595
Minnkota Power Cooperative, 46354
Oglethorpe Electric Membership Corp., 33778
Old Dominion Electric Cooperative, 27873
Pacific Northwest Generating Co., 5860
Plains Electric Generation & Transmission Cooperative, Inc., 1971
Sunflower Electric Cooperative, Inc., 35737
Tri-County Electric Association, Inc., 18221
Tri-State Generation and Transmission Association, Inc., et al., 32156
United Power Association, 22763, 51823
Western Farmers Electric Cooperative, 5021, 27220, 46355
Loan guarantees proposed:
Associated Electric Cooperative, Inc., 27220
Basin Electric Power Cooperative, 28527
Big Rivers Electric Corp., 30320
Buckeye Power, Inc., 15758
Central Electric Power Cooperative, Inc., 25158, 27873
Cooperative Power Association et al., 31420
Copper Valley Rural Electric Association, Inc., 40542
Dairyland Power Cooperative, 3733
East Kentucky Power Cooperative, Inc., 29023
Minnkota Power Cooperative, Inc., 2417
Seminole Electric Cooperative, Inc., 20522
United Power Association, 25453
Western Farmers Electric Cooperative, 18727, 31420
Rural telephone bank; revised bylaws, 28019

## SAFETY

*See Coast Guard.*
*Consumer Product Safety Commission.*
*Disease Control Center.*
*Federal Aviation Administration.*
*Federal Highway Administration.*
*Federal Railroad Administration.*
*Hearings and Appeals Office, Interior Department.*
*Mine Safety and Health Administration.*
*Mining Enforcement and Safety Administration.*
*National Highway Traffic Safety Administration.*
*National Transportation Safety Board.*
*Occupational Safety and Health Administration.*
*Occupational Safety and Health Review Commission.*
*Pipeline Safety Regulation Office.*

## SAINT ELIZABETHS HOSPITAL

RULES
Records and information, availability; CFR Part removed, 29005
Voluntary patients; CFR Part removed, 29005

## SAINT LAWRENCE SEAWAY DEVELOPMENT CORPORATION

RULES
Joint Tolls Review Board, procedure rules, 30539
Seaways; required maneuvering data and equipment, etc., 25817
Tolls tariff, 11672

PROPOSED RULES
Joint Tolls Review Board, procedure rules, 20820

Seaways; required maneuvering data and equipment, etc., 13075

NOTICES
Meetings:
Advisory Board, 16586, 27937, 36025, 47041, 54315
Montreal-Lake Ontario Section, 1978 navigation season; procedures for closing; inquiry, 14197, 17089, 50530

## SCIENCE AND EDUCATION ADMINISTRATION

PROPOSED RULES
Poultry improvement plan, 56295

NOTICES
Animal health and disease research funding eligibility; inquiry, 54283
Committees; establishment, renewals, terminations, etc.:
National Poultry Improvement Plan General Conference Committee, 25351
Grants:
Plant biology and human nutrition, 59030
Grants, plant biology and human nutrition basic research; guidelines, 9432
Improving Government regulations; inquiry, 21991
Meetings:
Agricultural Research and Extension Users National Advisory Board, 42287, 45910, 53784, 59856
Animal Health Science Research Advisory Board, 29594, 47586
Committee of Nine, 21027, 36666, 52508
Cooperative Forestry Research Advisory Board and Advisory Committee, 23750
Food and Agricultural Sciences Joint Council, 42287, 59856
National Arboretum Advisory Council, 16357
National Plant Genetics Resources Board, 16357, 40253
National Poultry Improvement Plan General Conference Committee, 25351
Special grants program, 1979 FY; application solicitation, 58312

## SCIENCE AND TECHNOLOGY POLICY OFFICE

RULES
CFR Chapter heading revised, 53440
National security and emergency preparedness telecommunications; CFR chapter revised, 50431

NOTICES
Committees; establishment, renewals, terminations, etc.:
Nuclear Waste Management Technical Advisory Group, 21524
Science, Technology and Development Advisory Committee, 34851
Meetings:
Dam Safety Programs Review Panel, 7384, 16824, 21087, 25392
Defense Department Basic Research Working Group, 3783
Earthquake Hazards Reduction Advisory Group, 8876
Energy Department Basic Research Working Group, 1566, 2028, 5908, 8215, 11777
Intergovernmental Science, Engineering, and Technology Advisory Panel, 1566, 5908, 7383, 7749, 11776, 15208, 20882, 28267, 29636, 42050, 54151, 55293
Nuclear Waste Management Technical Advisory Group, 23038, 26808, 31252, 37781, 46914
Review Panel on Dam Safety Programs, 13445
Science, Technology, and Development Advisory Committee, 46092, 54311
Science, Technology and Development Advisory Committee, 35408

## SECRET SERVICE

RULES
White House press pass; security clearance; issuance, 26719

## SECURITIES AND EXCHANGE COMMISSION

RULES
Conduct standards; law firms; appearance waivers, 36900
Financial statements:
Bank holding companies and banks; form and content, 41024, 43708
Marketable and other security investments; disclosure requirements, 1063
Oil and gas producing companies; financial accounting and reporting practices, 40712, 60405
Oil and gas producing companies; full cost accounting practices, 60413
Information and requests:
Freedom of information; records availability, reference room locations, 45991
Interpretative releases:
Accounting bulletins, staff; policy statement, 55239
Accounting matters; bank holding companies, 54228
Accounting matters; business combinations, purchase method, 50868
Accounting matters; commodity futures contracts, 36900
Accounting matters; disclosure of relationships with independent public accountants, 52218
Accounting matters; electric utility companies disclosures, 58554
Accounting matters; independence of accountants, interpretations and guidelines, 29936
Accounting matters; industry segment determination, 9600
Accounting matters; involuntary conversions, 29110
Accounting matters; nuclear fuel and electric generating plants, 2870
Accounting matters, oil and gas industry; replacement cost data disclosure, 40730
Accounting matters; replacement cost data, 4973
Institutional disclosure program; reporting obligation and filing requirements, 52698
Mutual funds; advertising, prospectus requirements and sales load variations, inquiry, 47495, 52022
Registrants, guide for reports or memoranda, 20486
Sales literature for mutual funds, 3352
Tender offers, registration requirements, 18163
Transactions, securities, by members of National securities exchanges, 18562
Investment Advisers Act:
Brokers and dealers; temporary exemption, 47176
Brokers and dealers; temporary exemption; extension of time, 19227
Investment Company Act (SEE ALSO Financial statements; Interpretative releases):
Forms and report requirements, 21664
Interpretative releases; sales literature for mutual funds, 3352
Management remuneration disclosure, 6060
Marketable and other security investments; disclosure requirements, 1063
Registration, report forms, and reporting requirements, 39553
Securities deposits, 50869
Shareholder communications and participation in corporate electoral process; registered management investment company quarterly reports; form N-1Q, 58532
Trust funds, multi-bank common; definitions, 2393
Organization, functions, and authority delegations:
Corporation Finance Division, Director, 4254
Enforcement Division, Director; relief from disqualification, 36621
Executive director et al., 13375
Investment Management Division; Director, 755, 3258, 3557
Market Regulation Division, Director, 11981
Market Regulation Division, Director; joint industry plan amendments, 50422, 57596
Regional Administrators, 15417
Practice rules:
Hearings, regulatory proceedings; in Washington, D.C., 28999
Petitions for rulemaking, 38575
Registration statement effectiveness suspension; notice of stop order proceedings, 52217
Public Utility Holding Company Act:
Marketable and other security investments; disclosure requirements, 1063
Wage and price standards; impact disclosure, 57596
Securities Act (SEE ALSO Financial statements; Interpretative releases):
Bankruptcy-related securities; resales, 14449
Beneficial ownership, filing and disclosure requirements; forms, 18500
Directors and executive officers, management remuneration, legal proceedings, etc.; reporting requirements, 34407
Economic performance projections, disclosure; interpretative releases, 53250
Forms; instructions for use, 21661
Industry segment determination, 9600
Industry segment reporting, 9603
Investment company registration, report forms and reporting requirements, 39554
Management remuneration; reporting requirements, 58186
Management remuneration disclosure, 6060

Marketable and other security investments; disclosure requirements, 1063
Mutual funds; advertising, prospectus requirements and sales load variations, inquiry, 47495, 52022
Oil and gas reserves and operations; registration statements and reports disclosure, 60423
Private placement exemption rule and form, 10550
Private placement exemptive rule; disclosure requirements modification, 41194
Registration; short form, 16677
Resale of securities, 43711
Resales of securities, safe harbor, 54230
Securities offerings, employee benefit plans, and reporting forms, 33905
Small offering exemption, dollar amount increase, 41385
Trust funds, multi-bank common; definitions, 2392
Underwriters in business combination transactions; status, 21661
Wage and price standards; impact disclosure, 57596
Securities Exchange Act (SEE ALSO Financial statements; Interpretative releases):
Accountants; disclosure of relationships by registrants, 29111
Accountants; reporting of changes by registrants, 24288
Annual assessment, brokers and dealers; form, 46299
Bankruptcy-related securities; resales, 14450
Beneficial ownership, filing and disclosure requirements, 55755
Beneficial ownership, filing and disclosure requirements; forms, 18495, 29768
Beneficial ownership of equity securities; institutional investors reporting, 25421
Broker-dealers, securities confirmations, 47503
Confirmation slips delivery and disclosure requirements, sent to customers by brokers and dealers; effective date postponed, 11981, 30271
Directors and executive officers, management remuneration, legal proceedings, etc.; reporting requirements, 34413
Economic performance projections, disclosure; interpretative releases, 53250
Forms; instructions for use, 21662
Industry segment determination, 9600
Industry segment reporting, 9603
Institutional investment managers, filing and reporting information, 26705
Investment company registration, report forms, and reporting requirements, 39553
Management remuneration; reporting requirements, 58186
Management remuneration disclosure, 6060
Marketable and other security investments; disclosure requirements, 1063
Off-board agencies, trading restrictions, 1328
Oil and gas reserves and operations; registration statements and reports disclosure, 60423
Over-the-counter securities; weekly quotation service operation; expiration, 4254
Quotations for reported securities, dissemination, 4350, 18557
Reporting forms; revision, 33905
Shareholder communications and participation in corporate electoral process, 58530
Transactions by members of National securities exchanges, 11553, 14451
Trust funds, multi-bank common; definitions, 2392
Uniform net capital rule, 9271, 10550
Uniform net capital rule, extension, 33906
Wage and price standards; impact disclosure, 57596

**PROPOSED RULES**

Financial statements:
Accountants, qualifications; extension of time, 4264
Accountants, qualifications; withdrawn, 29954
Accounting policies disclosure; withdrawn, 15730
Businesses, small; ability to raise capital; impact of disclosure requirements, 10876
Foreign private issuers; extension of time, 8807
Oil and gas producing companies; financial accounting and reporting; extension of time, 19668
Oil and gas producing companies; financial accounting and reporting; hearing and inquiry, 878, 6810
Oil and gas producing companies; full cost accounting practices, 40724
Oil and gas producing companies; supplemental earnings summary, 40726
Replacement cost data disclosures; mineral resources assets; extension of time, 12334, 19668
Small business; ability to raise capital and impact of disclosure requirements, 9823
Interpretative releases:
Foreign private issuers; extension of time, 8807
Lost and stolen securities program; advance notice, 34790, 43035
Investment Advisors Act:
Cash referral fees, 6095
Investment Company Act (SEE ALSO Financial statements; Interpretative releases):
Accountants, qualifications; extension of time, 4264
Accounting policies disclosure; withdrawn, 15730
Annual reports filing; 90 days; withdrawn, 39396
Businesses, small; ability to raise capital; impact of disclosure requirements, 9823, 10876
Conduct standards; unlawful activities prevention, code of ethics establishment, etc., 12721, 16192, 19669
Distribution expenses borne by mutual funds; extension of time, 36643
Distribution expenses borne by mutual funds; inquiry, 23589
Financial statements, 19668
Public Utility Holding Company Act (SEE Also Financial statements; Interpretative releases):
Accountants, qualifications; extension of time, 4264
Accounting policies disclosure; withdrawn, 15730
Businesses, small; ability to raise capital; impact of disclosure requirements, 9823, 10876
Mutual and subsidiary service companies, uniform system of accounts, 22379, 35490
Safe-harbor rule for projections, 53251
Securities Act (SEE ALSO Financial statements; Interpretative releases):
Accountants, qualifications; extension of time, 4264
Accounting policies disclosure; withdrawn, 15730
Businesses, small; ability to raise capital; impact of disclosure requirements, 9823, 10876
Insurance companies; investment contracts annuities, exemptive provisions, 22053
Issuers, small; registration and reporting requirements, 10888
Management remuneration; reporting requirements, 34415
Oil and gas interests; registration of offerors; withdrawal, 35730
Oil and gas reserves and operations; registration statements and reports disclosure, 40720
Private placement exemptive rule, 10701, 15441
Private placement exemptive rule; withdrawn, 41235
Registration; short form, 41052
Registration of securities, short form, 56053
Registration statements on Form S-8, effective date of amendments; withdrawn, 43725
Resales of securities, 43726
Safe-harbor rule for projections, 53251
Sales load variations during periodic open seasons; withdrawal, 47542
Small offering exemption, 55254
Securities Exchange Act (SEE ALSO Financial statements; Interpretative releases):
Accountants, qualifications; extension of time, 4264
Accounting policies disclosure; withdrawn, 15730
Annual report forms (10-K); advance notice, 37460, 59092
Beneficial ownership, filing and disclosure requirements, 18501, 54256
Broker-dealers, net capital rule, 30806
Brokers and dealers; municipal securities, net capital requirements, 33935
Brokers and dealers, SECO; reports and annual assessments, 38026
Businesses, small; ability to raise capital; impact of disclosure requirements, 9823, 10876
Clearing agencies registration, 10288
Depository participant disclosure and information availability to qualified issuers and non-issuers, 8269
Foreign private issuers; forms and guidelines; extension of time, 8807
Issuers, small; registration and reporting requirements, 10888
Lost and stolen securities program; advance notice, 34790, 43035

Management remuneration; reporting requirements, 34415
Market system, National; development, 4354
Municipal securities dealer registration by banks; form, 32309
Oil and gas reserves and operations; registration statements and reports disclosure, 40720
Proxy information dissemination; issuers and intermediary recordholders; withdrawn, 7651
Quotation information dissemination; withdrawal, 16512
Safe-harbor rule for projections, 53251
Securities confirmations; disclosure requirements, 47538, 56247
Shareholder communications and participation in corporate electoral process, 31945
Shareholder communications and participation in corporate process; withdrawal notice, 58533
Small businesses; ability to raise capital; impact of disclosure requirements, 15335
Transaction reports; collection and dissemination, 50606
Transaction reports and quotation information; dissemination and display, 50606
Transactions, going private, by public companies or their affiliates; extension of time, 3574
Stocks, preferred and common; presentation in financial statements, 57612
Trust Indenture Act:
Safe-harbor rule for projections, 53251

**NOTICES**

Broker-dealers, fair treatment of customer accounts, 46397
Corporate disclosure in proxy and information statements; anti-takeover or similar proposals, 49863
Exchange-traded call options, interpretations, 1415
Exchange-traded foreign options, 21756
Exempted securities; Farm Credit Investment Bonds-Banks for Cooperatives, 26678
Foreign Corrupt Practices Act; notification of enactment, 7752
Foreign securities; exemptions, 39878
Investment companies; procedures for processing post-effective amendments and preliminary proxy material, 49866
Investment companies, registered management, fidelity bonding; determination, 41321
Meetings:
Valuation of portfolio securities by money market funds, 2028
Meetings; Sunshine Act, 1173, 1884, 2474, 2475, 2814, 3792, 3793, 4539, 4750, 5646, 5647, 6196, 6716, 6903, 6904, 7295, 7394, 8059, 8923, 9763, 9931, 10680, 11038, 11657, 11894, 12181, 12438, 13164, 13485, 13486, 14373, 14599, 14797, 15405, 15406, 15554, 16440, 16883, 17113, 17628, 18129, 18832, 19331, 20612, 21106, 21793, 21794, 22296, 22518, 23087, 24170, 24406, 24791, 25407, 26185, 26363, 27642, 28329, 28895, 28896, 29410, 29663, 29888, 30185, 30982, 31305, 33374, 34575, 34863, 34864, 35621, 36197, 36759, 37333, 37833, 38505, 38784, 39216, 39638, 39926, 40351, 40995, 41161, 41466, 42853, 43411, 44612, 45510, 46156, 46627, 47078, 47651, 49108, 49109, 50540, 50800, 51505, 51897, 52092, 52359, 53103, 54176, 54351, 55056, 55312, 56338, 57719, 58012, 58704, 58898, 59611, 60367, 11298B
National clearance and settlement system; hearings, 4295, 8895, 16231, 19947
National market advisory board; advisory committee review; inquiry, 9909
National market system plans:
Consolidated Tape Association, 50512, 50520
Privacy Act; systems of records, 21769, 21771, 36536, 36538, 56119
Quotations for reported securities; exemptions:
Cincinnati Stock Exchange, 33976
Intermountain Stock Exchange, 33978
Philadelphia Stock Exchange, 33981
Spokane Stock Exchange, 33983
Regulatory responsibility allocation plans, filing:
National Association of Securities Dealers, Inc., et al., 14195
Securities Exchange Act:
Lost and stolen securities program; extension of pilot period, etc., 52418, 55297
Securities Exchange Act; Section 11(a), transactions by members of National Securities exchanges; extension of effective date, 23777
Securities Investor Protection Act; proposed rule changes:
Securities Investor Protection Corp., 30953, 30954
Self-regulatory organizations; proposed rule changes:
American Stock Exchange, Inc., et al., 1162, 1163, 1413, 1568, 1656, 1854, 1855, 3449, 3957, 4295, 5122, 5448, 6181, 6850, 7076, 7384, 8311, 9665, 10656, 10657, 10660, 10994, 11625, 14558, 14559, 15208, 15819, 16576, 17888, 17893, 18379, 19946, 20585, 22111, 22112, 23778, 26655, 29865, 30152, 31478, 33849, 34851, 35766, 35775, 36726, 40967, 41117, 41442, 44945, 46092, 49597, 49867, 50512, 53076, 55296, 58664, 60678
Arcs Equities Corp., 4472
Boston Stock Exchange, Inc., 9669, 16825, 22113, 25506, 29865, 31480, 31483, 31485, 32006, 35410, 39199, 39877, 41442, 42322, 44946, 49376
Boston Stock Exchange Clearing Corp., 26164, 28590, 40968, 46391
Bradford Securities Processing Services, Inc., 1567, 7277, 28590, 36545, 56116
Chicago Board Options Exchange, Inc., et al., 1164, 4295, 4474, 8878, 8879, 9665, 9670, 11629, 11632, 12414, 18373, 18374, 19085, 19086, 20585, 20586, 21751, 21763, 22471, 22472, 24751, 25212, 26647, 26649, 28061, 28269, 29866, 29867, 32341, 32480, 33850, 35412, 36727, 36742, 37504, 38651, 40092, 43782, 46398, 47020, 50515, 50518, 52318
Cincinnati Stock Exchange, 2674, 14783, 17894, 44951
Depository Trust Co., 1163, 1658, 3326, 3637, 6185, 12980, 16576, 16579, 23775, 24155, 28591, 30942, 33977, 38652, 40969, 44946, 46615, 52792, 56300
Midwest Clearing Corp. et al., 51, 52, 6349, 6853
Midwest Securities Trust Co., 6853
Midwest Stock Exchange, Inc., 804, 3325, 3784, 3958, 9671, 15821, 18078, 22114, 23063, 24757, 26652, 26654, 28273, 29871, 29872, 33854, 35769, 41118, 44579, 44947, 45484, 46399, 47336, 50978, 55299, 56967, 57708
Municipal Securities Rulemaking Board, 1163, 1858, 1861, 3958, 7077, 7078, 8884, 8885, 9672, 12977, 14191, 15821, 19947, 23063, 26164, 26659, 28275, 30379, 30946, 31486, 31489, 33854, 39200, 41110, 41111, 49870, 50523, 50525, 50526, 51491, 53081, 53082, 54312, 57708, 60681
National Association of Securities Dealers, Inc., 53, 2468, 6186, 13450, 16832, 17427, 24758, 28065, 28597, 29387, 30950, 32483, 33978, 35416, 35446, 37046, 39877, 41115, 43788, 46396, 50528, 51154, 51491, 52316, 58689, 58690, 59191, 60682
National Securities Clearing Corp., 7386, 21760, 21761, 23063, 27625, 28597, 28598, 33979, 42325, 47620, 58437
New England Securities Depository Trust Co., 13453, 40970
New York Stock Exchange, Inc., et al., 804, 1165, 1166, 1417, 1862, 2468, 3637, 3638, 4300, 5125, 6187, 6188, 9399, 9566, 10659, 10996, 12138, 12139, 12417, 12979, 14192, 15210, 15822, 16581, 17429, 17899, 18375, 18376, 18380, 19089, 19738, 19743, 21763, 22115, 23064, 23065, 23066, 25212, 28276, 29201, 29872, 29873, 30381, 31485, 34857, 36024, 36740, 37505, 41116, 44948, 46397, 47629, 49870, 49871, 53084, 60686
Options Clearing Corp., 3962, 4301, 6855, 23775, 24157, 31486, 33979, 38753, 38754, 40089, 46093, 49598
Pacific Clearing Corp., 4302, 24639, 28277, 35773
Pacific Securities Depository Trust Co., 6190, 24640, 46400
Pacific Stock Exchange, Inc., et al., 1418, 5125, 11634, 12139, 12417, 21763, 23776, 26654, 28278, 29388, 29390, 30153, 30952, 33980, 33981, 35416, 36741, 39202, 39203, 40092, 40965, 53086, 55301
Philadelphia Stock Exchange, Inc., 1167, 7077, 7386, 20067, 21765, 22117, 22119, 23067, 23779, 26660, 28875, 29202, 29873, 30153, 30154, 35417, 36545, 36732, 36741, 40089, 40093, 51492, 52793, 53086
Securities Investor Protection Corp., 52318
Stock Clearing Corp. of Philadelphia, 8892, 15823, 21768, 27627, 33858, 50527, 50979, 58242
TAD Depository Corp., 12979
Standardized options:
Call option classes, applications, 35773
Involuntary delisted options classes, replacement of; guidelines, 30380, 35767
Markets structure; inquiry, 26660, 36545
Moratorium, 35770, 35772
Rule change proposals, disapproval proceeding, 35766
Valuation of portfolio securities by money market funds; meetings, 2028
*Hearings, etc.:*
A Corporate Trust, Series 1, et al., 43777
Aaron Brothers Corp., 12136

Adams Fiduciary Bond Fund, 49596
Admiralty Fund et al., 13446, 14557, 19945
Aetna Fund, Inc., 28873
Air California, 15377
Air Express International Corp., 55296
Alabama Power Co. et al., 6180, 15815, 15816, 18367, 20584, 21749, 31487, 36540, 57697
Alcon Laboratories, Inc., 35410
Allegheny Airlines, Inc., 46615
Allegheny Power System, Inc., et al., 10655, 10992, 33973, 59184
Alpex Computer Corp., 15817
Alpine Geophysical Associates, Inc., 43079
Alternate Energy Systems, Inc., 19731
American Airlines, Inc., 9397
American Electric Power Co., Inc., et al., 1413, 10658, 10993, 11623, 24153, 40962, 42320, 42321
American Electric Power Service Corp. et al., 21750
American Family Mutual Insurance Co., 56966
American General Bond Fund, Inc., et al., 9908
American General Convertible Securities, Inc., et al., 38649
American General Life Insurance Co. of Delaware, 37503
American Land Co., 39199
American Medical Association et al., 8309
American Medical Buildings, Inc., 43079
American Money Instruments, Inc., 51484
American National Bond Fund, Inc., et al., 53075
American National Growth Fund Share Accumulation Plans et al., 2467
American Safety Equipment Corp., 49805, 56966
American Stock Exchange, Inc., et al., 8877, 17419, 36732
American Utility Shares, Inc., et al., 25752
American Variable Annuity Life Assurance Co. et al., 57698
AMIC Corp., 26649
Aminex Resources Corp., 9909
Amtel, Inc., 40084
Anchor Income Fund, Inc., 53521
Ancorp National Services, Inc., et al., 36541
API Trust et al., 38751
Appalachian Power Co. et al., 24758, 36734, 52072, 55496, 57700
ARCS Equities Corp., 25505, 37045
Arkansas Power & Light Co., 11627, 26646, 28061, 34225, 34227, 60679
Arkansas-Missouri Power Co. et al., 11626, 14183
ASA Ltd. et al., 30940
Associated Wholesalers, Inc., 35410
Audax Fund, Inc., 3323
Baker & Botts Deferred Compensation and Savings Plan, 47027
Bank of America National Trust & Savings Association, 1855
Bankers Security Variable Annuity Fund A et al., 36728
Barry Wright Corp., 26647
Baxter/Travenol International Capital Corp., 43780
Bayrock Capital Series, Inc., 55497
BEM Holding Corp., 20590
Berkshire Capital Fund, Inc., et al., 15505
Binney & Smith, Inc., 41107
Block Engineering, Inc., 49861
Boston Stock Exchange, Inc., et al., 20285, 46093, 55297, 55498, 60680
Bourns, Inc., 42322
Broad Street Investing Corp., 41106
Browning, 52073
Bryan, Cave, McPheeters & McRoberts Retirement Plan, 33974
Budd Co., 47803
Builders Resources Corp., 23059
Bullock Tax-Free Shares, Inc., 35768
Bunker Ramo Corp. et al., 14184, 16825, 22469, 29198
Burdox, Inc., 38142
California Financial Corp., 8878
California Mutual Fund, 29198
California Windsor Co., 52074
Canada Southern Petroleum Ltd., 9398
Canaveral International Corp., 14783
Capital Fund of America, Inc., et al., 47023
Capitol Life Insurance Co. et al., 46392, 53077
Carborundum Co., 35411
Carolina Telephone & Telegraph Co., 43781
Cayman Corp. et al., 45483
Cedar Coal Co. et al., 25506
Central Power & Light Co., 35411, 47025, 47026
Central Power & Light Co. et al., 28267
Central & South West Corp. et al., 1415, 6182, 9398, 11629, 25508, 32340, 46394, 46396
Central & South West Services, Inc., 14188
Central & Southwest Fuels, Inc., et al., 58671
Century Shares Trust et al., 30941
Cherry Hill Fuels Corp. et al., 33975
Chicago Milwaukee Corp., 3450, 23667
Christiana Companies, Inc., 59184
Christiana Securities Co., 6182
Claremont Capital Corp. et al., 52311
Coachmen Industries, Inc., 31487
Colonial Gas Energy System et al., 25754
Colonial Tax-Managed Trust et al., 57701
Colony Foods, Inc., 35412
Columbia Gas of Ohio, Inc., et al., 24751
Columbia Gas System, Inc., et al., 1162, 6183, 15022, 19731, 29867, 31475, 49868, 55498, 57702
Combined Securities Fund, Inc., 52074
Community Public Service Co., 1576
Connecticut General Life Insurance Co. et al., 8879
Connecticut Light & Power Co. et al., 8311, 50977, 53079, 56742, 58674
Connecticut Yankee Atomic Power Co., 24154, 36728
Consolidated Natural Gas Co. et al., 11632, 14189, 21754, 23060, 28874, 46098, 51484, 57703, 58675
Consolidated Tape Association, 17422, 36736
Continental Assurance Co. et al., 40963
Continental Mortgage Investors, 24155
Continental Telephone Co. of Virginia, 29868
Corroon & Black Corp., 18368
County Kitchen International, Inc., 8312
Covington & Burling Retirement Plan, 2962
Culligan International Co., 42322
Cummins International Finance Corp., 2963
Curtis Noll Corp., 6184
Cyanamid International Development Corp., 2963
Daily Income Fund, Inc., et al., 51485
Daniel Industries, Inc., 29198
Data Documents, Inc., 1856
Davidge Early Bird Fund, 3958
Davis Polk & Wardwell, 32482
Developing Growth Shares, Inc., et al., 55499
Dewey, Ballantine, Bushby, Palmer & Wood Profit Sharing Plan, 40090
Diversey Corp., 56967
Dreyfus Liquid Assets, Inc., 53080
Dreyfus Money Market Instruments, Inc., 12414
Driskill Hotel Corp., 47804
DSAG Corp., 16825
Dynamics Corp. of America, 17423
Dynavest Fund, Inc., 59185
E.F. Hutton & Co., Inc., 15506
E.F. Hutton Trust, 28271
Eastern Utilities Associates et al., 3324, 51487
Educators Life Insurance Co. of America et al., 42323
Egret Fund, Inc., 43080
Elfun Trusts, 38751
Elmer Fox, Westheimer & Co. Retirement Plan, 40085
Emery Industries, Inc., 47804
Envirodyne Industries, Inc., 23667
Epoch Resources Fund, Inc., 803
ESL Inc., 52075
Essex Chemical Corp., 57704
Estacado, Inc., 13446
Exeter Fund, Inc., et al., 12973
Fall River Electric Light Co. et al., 46099, 58239
Farm Bureau Mutual Fund, Inc., 23061
Farmers Telephone Co., 49862
Farrell Lines, Inc., et al., 20591
Federal's, Inc., 10995
Federated Exchange Fund, Ltd., 26649
Federated Master Trust, 15507
Federated Option Income Fund, Inc., et al., 25392
Felsway Corp., 58676
Fidelity Money Market Trust, 59185
Fidelity Municipal Bond Fund, Inc., 58676
Financial General Bankshares, Inc., 7279
Financial Municipal Bond Fund, Inc., 46099
First Federal Savings & Loan Association of Chicago, 7750
First Midwest Capital Corp., 59187
First Multifund for Daily Income, Inc., 38143
First National Bank of Chicago et al., 14190
First West Texas Capital Corp., 7385
Fletcher Fund, Inc., 38652
Food Fair, Inc., 52792
Ford International Capital Corp., 4297
Foster Management Co., 52313
Franklin Life Bond Fund, Inc., 8881
Franklin Life Equity Fund, Inc., 8881
Frigitemp Corp., 30379
Fund for Mutual Depositors Inc., 49869
Fundex, Inc., et al., 49375
GAC Corp., 1856
Gearhart-Owens Industries, Inc., 803
General American Life Insurance Co. et al., 15509
General American Transportation Corp., 19087
General Felt Industries, Inc., 40086
General Public Utilities Corp. et al., 18368, 55501, 57705
Georgia Power Co. et al., 8881, 12772, 15820, 19087, 40086, 47028, 49380

Gibson, Dunn & Crutcher Retirement Plan, 34229
Glendale Federal Savings & Loan Association, 42324
Government Securities Trust et al., 25393
GPM Balanced Fund, Inc., et al., 16827
Graham Magnetics, Inc., 38144
Greater Washington Industrial Investments, Inc., 58679
Gulf Power Co., 14190, 23061, 36541
Gulf Republic Financial Corp., 49862
Hahn, Loeser, Freedheim, Dean & Wellman Reltirement Plan, 57705
Hallcraft Homes, Inc., 3450
Harman International Industries, Inc., 9666
Harte-Nanks Southern Communications, Inc., 38145
Hartford Electric Light Co., 12416
Hartford Variable Annuity Life Insurance Co. et al., 3451, 6851
Henry Pratt Co., 35413
Highland Capital Corp. et al., 29869
Highland Investment Corp., 52075
Hoffman Electronics, Inc., 17424
Home Savings & Loan Association, 30943, 58680
Houston Complex, Inc., et al., 39199
Howard Discount Centers, Inc., 6852
IDS Progressive Fund, Inc., et al., 43783
Imperial Chemical Industries Ltd. et al., 47021
Ina Capital Bond Trust, 40087
Income Trust for Government Securities, First Series, et al., 19732
Income Trust for U.S. Government Guaranteed Securities, 35413
Indian Head Inc., 58680
Indiana & Michigan Electric Co., 2964, 4297, 26650, 35415, 36542, 47628, 55502, 57707
Indiana & Michigan Power Co., 4298
Insured Municipals-Income Trust et al., 1567, 43785, 51488
Integon Growth Fund Corp., 20586
Integrated Growth Fund, Inc., 27625
Intercapital Liquid Asset Fund, Inc., et al., 16830
International Aluminum Corp., 17898
International Dollar Income Fund, First Monthly Payment Series, et al., 58681
International Investors Inc. et al., 1856, 17424, 56740
International Life Insurance Co. of Buffalo, 58683
International Liquid Assets, Inc., 29199
International Systems & Control Corp., 52316
Interpool Ltd., 56967
Interway Corp., 57706
Investors Corp. of North Carolina, 60680
Investors Diversified Services, Inc., et al., 38145
Investor's Government-Guaranteed Income Trust, 28592
Investors' Municipal-Yield Trust, Series 1 et al., 46100
Isham, Lincoln & Beale Profit-Sharing Plan and Trust, 59189
Ivac Corp., 18369
Ivy Fund, Inc., et al., 26655
Jamesway Corp., 30944
Janus Fund, Inc., 32480
Jersey Central Power & Light Co., 10995
Jesup & Lamont Inc., 13448
Jet Capital Corp., 31476, 55503
John Hancock Investors, Inc., et al., 24156
John Nuveen & Co., Inc., et al., 30944
Kaye, Scholer, Fireman, Hays & Handler Retirement Plan, 40087
Kentucky Power Co. et al., 51489, 55505
Knott Hotels Corp., 2469
Kohler Co., 40089
Kollmorgen Corp., 24157
Korfund, Inc., 54151
Kramer, Lowenstein, Nessen, Kamin & Soll Profit-Sharing Retirement Plan, 58687
La Crosse Cooler Holding Corp., 38146
Lake Shore Financial Corp., 8895
Lastarmco Inc., 29871
Laventhol & Horwath Pension Plan, 24759
Lee Enterprises, Inc., 33851
Lehigh Portland Cement Co., 16580
Leslie Fund for Income, Inc., 16230
Lexington Research Fund, Inc., et al., 15209
Lexitron Corp., 21757
Life Insurance Co. North America et al., 19733
Lincoln National Investment Plans, 30152
Lorain Telephone Co., 30945
Louisiana Power & Light Co., 7076, 18369, 20587, 20588, 25509, 55506
Louisiana & Southern Life Insurance Co., 12975
Lowell Gas Co. et al., 25396, 56116
LTV Corp. et al., 31487
Lykes Bros., Inc., 19088
Macrodata Corp., 21757
Major Resources, Inc., 14559
Manhattan Life Insurance Co., 7385
Marathon Securities Corp. et al., 18370, 55507
Marcus, Adolf, et al., 5121
Marriott Condominium Development Corp. et al., 8883
Maryland Tax Exempt Trust Series 1 et al., 55507
Massachusetts Capital Resource Co., 12137, 34231
Massachusetts Mutual Life Insurance Co. et al., 5123, 8312, 8313, 17426, 47029, 52077
McNeil Money Market Fund, Inc., 43786
Medenco, Inc., 44947
Media Investment Co. et al., 24752, 51490
Medical Computer Systems, Inc., 35415
Mercantile Industries, Inc., 16580
Merrill Lynch, Pierce, Fenner & Smith, Inc., et al., 12975, 55509
Mervyn's, 42324
Metrohio Corp., 59190
Metropolitan Edison Co., 17898, 34232
Metropolitan Life Insurance Co. et al., 33851
MFS Managed Municipal Bond Fund et al., 33353
Michigan Power Co., 49863, 55298
Middle South Services, Inc., et al., 2965, 10658, 11633, 16230, 19089, 23062, 26651, 33853, 41443, 55298, 56118, 57707, 58683
Midwest Corp., 15210
Midwest Stock Exchange, Inc., et al., 2965, 13450, 20286, 60681
Milbank, Tweed, Hadley & McCloy Partners' Retirement Plan, 52078
Miller-Wohl Co., Inc., 37045
Minneapolis Shareholders Co., 19734
Mira-Pak, Inc., 19309
Mississippi Power Co., 11633, 49869
Modern Maid Food Products, Inc., 26164
Money Poolers Income Trust, 50523
Monongahela Power Co. et al., 24755, 29199, 34232, 36737, 56118
Multi-Amp Corp., 54151
Municipal Exempt Trust et al., 28062
Mutual Asset & Management, Inc., 19737
Mutual Investing Foundation et al., 26657
Mutual Trust, 7750
Narragansett Capital Corp. et al., 21757, 30947
Narragansett Electric Co., 3325
National American Corp., 21760
National Aviation & Technology Corp., 36739
National Corporate Trust, 33854
National Fuel Gas Co. et al., 14559, 16580, 30951, 33355, 50978, 58684, 59191
National Fuel Gas Distribution Corp. et al., 58685
National Fuel Gas Supply Corp. et al., 6853
National Government Securities Trust, 25510
National Industries, Inc., 24756
National Municipal Trust, First and Subsequent National and State Series, 13451
Naum Bros., Inc., 35775
New England Electric System et al., 8885, 53083
New England Power Co. et al., 53083
New Jersey Tax-Exempt Income Trust et al., 60683
New Orleans Public Service, Inc., 38146, 38147, 41443
New York, New Haven & Hartford Railroad Co., 19743
New York Magazine Co. Inc., 5124
New York Municipal Trust et al., 49382
New York-New Haven & Hartford RR Co. et al., 10659
Newpark Resources, Inc., 2680
Newton Select Fund, Inc., 4299
Nicholas Daily Income Fund, Inc., 37047
Nineveh Water Co. et al., 40964, 58685
North River Securities Co., Inc., 32481
Northeast Utilities et al., 9909, 12773, 24925
Northeast Utilities Service Co., 52317
Northern States Power Co., 19743
Northwest Production Corp., 24756
Northwestern Mutual Life Insurance Co. et al., 17431
Nuveen Municipal Bond Fund, Inc., et al., 49385
Nuveen Tax-Exempt Bond Fund Medium-Term, 51492
Nuveen Tax-Exempt Bond Fund-Multi-State et al., 53084
Ohio Edison Co. et al., 7751, 8886, 13453, 24922, 34233, 41007, 51157
Ohio Power Co. et al., 3638, 6854, 26652, 33857, 47030, 52080, 57709
Ohio Valley Electric Corp., 36543
Oli, Inc., et al., 20589
Omega Equities Corp., 11634
Pacific Far East Line, Inc., 25754
Pacific Northwest Bell Telephone Co., 50527
Pacific Resources, Inc., 4303, 13454, 23066
Pacific Stock Exchange, Inc., 19091
Palm Beach Co., 35775
Panhandle Eastern Pipe Line Co., 28868
Parker, Milliken, Clark & O'Hara Retirement Plan and Trust Agreement, 26658
Parthenon Fund, Inc., 18371

Pasta King, Inc., 45483
Pembroke Capital Co. Inc., 55299
Pennsylvania Electric Co., 13455, 20590, 58686, 60688
Pharmacare, Inc., 53
Philadelphia Electric Power Co. et al., 57710
Philadelphia Fund, Inc., et al., 8887
Philadelphia Stock Exchange, Inc., et al., 20286, 60688
Pilgrim Fund Inc. et al., 43787
Pioneer Fund, Inc., et al., 29874
Piper Aircraft Corp., 38652
Pligrowth Fund, Inc., et al., 9667
Power-Train, Inc., 56119
Presidential Life Insurance Co. et al., 59193
Presto Products, Inc., 40090
Professional Investment Co., Inc., 2966
Providor Growth Fund, 27625
Providor Investors Fund, 27626
Public Service Co. of Oklahoma et al., 12771, 58688
Puerto Rico Telephone Co., 40330
Puritan Fund, Inc., et al., 28278
Putnam Convertible Fund, Inc., et al., 56968
Putnam Daily Dividend Trust, 18372
Putnam Mariner Fund, Inc., 53087
Real Estate Associates Limited et al., 41444
Realty ReFund Trust, 43080
Redmond Growth Fund, Inc., 1576
Reinell Industries, Inc., 59195
Republic Metal Products, Inc., 35417
Resorts International Inc., 15822
Ruetgers-Nease Chemical Co., Inc., 14367
Ryan Homes, Inc., 42325
Safeco Equity Fund, Inc., et al., 6855
Scudder Development Fund et al., 8315
Sentinel Bond Fund, Inc., et al., 8890
Sentry Fund, Inc., et al., 8316
Sequential Information Systems, Inc., 20286
Seven-Up Co., 52082
Shearson Appreciation Fund, Inc., et al., 6190
Shepmyers Investment Co., 41108
Simpson Thacher & Bartlett Retirement Plan, 47031
Source Investment, Inc., 60689
Southern Co. et al., 8888, 11635, 21767, 31477, 36741
Southern Ohio Coal Co. et al., 58240
Southwest Airlines Co., 9668
Southwest Petro-Chem, Inc., 47804
Southwestern Electric Power Co., 4304, 6191, 28280, 33857
Spokane Stock Exchange, Inc., 16582
St. Paul Capital Fund, Inc., et al., 38653
St. Paul Life Fund, Inc., 52081
Standard Motor Products, Inc., 2681
Standard Oil Co., 6856
Standard Shares, Inc., 16832
Standard-Pacific Corp., 22472
Starr Broadcasting Group, Inc., 1862
State Mutual Life Assurance Co. of America, 8895, 34234, 41446
State Street Investment Corp., 21767
Sterns Holdings Inc., 8891
STP Corp., 52081
STV, Inc., 12139
Sullivan & Cromwell Retirement Plan, 33982
Sun Electric Corp., 57713
Sunair Electronics, Inc., 56969
Superblock Industries, Inc., 58689
Supreme Equipment & Systems Corp., 12139
Symmar, Inc., 29875
System Fuels, Inc., et al., 8896, 47032, 49871, 57711
Systems Venture Capital, Inc., 29875
T. Rowe Price Associates, Inc., et al., 33859
Tax-Exempt Bond Fund of Virginia, First Series et al., 44949
Templeton Growth Fund, Ltd., et al., 8893
Templeton World Fund, Inc., et al., 8894
Tennessee Forging Steel Corp., 1862
Terminal Railroad Association of St. Louis, 14368
Thomson McKinnon Employee Stock Ownership Trust, 14192
Tiffany Industries, Inc., 25755
Tiger Oil International, Inc., 6192
Time Holdings, Inc., 9669
Tokheim Corp., 57714
Toth Aluminum Corp., 1568
Travelers Insurance Co. et al., 15823
Tridair Industries, 3326
Trustees' Equity Fund, Inc., 40965
Union Fidelity Corp., 13456
Union Petrochemical Corp. of Nevada, Inc., 16582
Union Tank Car Co., 52082
United Canso Oil & Gas Ltd., 9400
Unitek Corp., 29876
Universal Container Corp., 22473
Vance, Sanders Investors Fund, Inc., et al., 47034
Vance, Sanders Municipal Bond Fund, Ltd., et al., 8317
Vanderbilt Growth Fund, Inc., 25397
Vanderbilt Income Fund, Inc., 25398
Variable Annuity Life Insurance Co. of America, 23778
Veeco Instruments, Inc., 59195
Vermont Yankee Nuclear Power Corp. et al., 35417, 60689
Wabash, Inc., 1577
Warner Communications, Inc., 2469
Washington Mutual Savings Bank, 56970
Washington National Fund, Inc., 52320
Washington National Fund, Inc., et al., 29203
Weeden Corporate Bond Trust et al., 21772
Weenie Machine International, Inc., 16582
Weight Watchers International, Inc., 58689
Weiss, Peck & Greer, 14193
Weksler Instruments Corp., 56970
Wells, Rich, Greene, Inc., 52083
Westamerica Automotive Corp., 1862
Western Carolina Telephone Co., 29876
Western Gold Mining, Inc., 1862
Western Industrial Shares, Inc., et al., 11637
Western Preferred Corp., 40091
Westfield Growth Fund, Inc., 22473
Westfield Investment Fund, Inc., 22473
Whiting Corp., 24757
Whitman & Ransom Retirement Savings Plan, 35773
Wisconsin Michigan Power Co., 15378, 26171
WITS, Inc., 17899
WUI, Inc., 37047
Y&S Candies, Inc., 36152
Yankee Atomic Electric Co., 57714

## SELECTIVE SERVICE SYSTEM

### NOTICES

Improving Government regulations, 15211, 50980

## SMALL BUSINESS ADMINISTRATION

### RULES

Administration:
  Financing Office; responsibilities, 3
Business loans:
  Cable TV and radio and television broadcasters; eligibility for financial assistance, 3702
  Closing fee charges, removal, 35907
  Eligibility; illegal and related activities prohibition, 29271
  Guaranty agreements; quarterly status reports, automated billing system, etc., 44471, 46960
  Interest rates, fluctuating; policy, 26279
  Parolees and probationers; ineligibility, 29101
Conduct standards, 3078
Disaster loans:
  Economic dislocation and injury, 32403
  Economic injury and regulatory compliance eligibility clarification, etc., 6578, 10684
Floodplain management and wetlands protection; policy and procedures, 22298, 32128, 49237
Freedom of information appeals; authorizing official, 38573
Handicapped assistance loans:
  Associate, definition; loans to nonprofit organizations, 27985
Loans to State and local development companies:
  LDC participation and fees, 43019
  Limits and waivers, administrative, 14007
Management assistance:
  Services, scope and delivery, 5801
Nondiscrimination:
  Financial assistance programs; disaster loans, economic dislocation, 21322
Pollution control, financing guarantees, 33232
Procurement and technical assistance:
  Certificate of competency approval authority, 1489
Small business investment companies:
  Equity securities; purchase from underwriters, 39563
  Fidelity insurance, technical amendments, 59473
  Homebuilders financing; discontinuance of case-by-case exemptions, 10684
  Movie production and distribution financing, licensees specializing in; pilot program, 21439
  Partnerships, limited; IRS qualification, 54924
  Portfolio investments, licensee; real estate concerns and motion pictures, limitations, 9135
  Retention of investments, 28455
Small business size standards:
  Certificate of competency applicants on unrestricted procurements, 30533
  Construction and service contractors; surety bond guarantee assistance, 36053
  Marine services, offshore; loans and procurement assistance, 10333

Nightwear manufacturing, women's and children's, 22173
Protective services, government procurement for, 31884
Radio and television broadcasting loans; eligibility criteria, 19352
Size determination procedures, size status proceedings decisions, etc., 13499

**PROPOSED RULES**

Business loans:
Interest rates, fluctuating; policy, 12720
Small contractors, eligibility and maturity periods, 47734, 53765
Disaster loans:
Disaster declaration request procedures and time limits, 42016
Economic dislocation and injury, 6619
Energy loan assistance, 39394
Loans to State and local development companies:
LDC participation and fees; clarification, 27554
Limits and waivers, administrative, 3130
Nondiscrimination:
Financial assistance programs; disaster loans, economic dislocation coverage, 9488
Handicapped in financial assistance programs, 9488, 14674
Small business investment companies:
Partnerships, limited; IRS qualification, 30067
Small business size standards:
Accounting and auditing services, 24697, 35944
Coal mining firms; set-aside leases on Federal coal land; advance notice, 57611
Construction contractors, surety bond guarantee, 21689
Nightwear, women's and children's, manufacturing firms; small business definition, 11584
Offshore marine services, 12
Protective services, government procurement for, 12721
Radio and television broadcasting loans; eligibility criteria, 5846
Timber sales, salvage, set-aside; preferential treatment for small business concerns, 31022, 45591

**NOTICES**

Applications, etc.:
A B Small Business Investment Co., Inc., 44580, 53521
Advent Capital Corp., 31252, 37048
Affiliated SBIC, Inc., 44580
Agribusiness Capital Co., 32484
Alaska Business Investment Corp., 3188
Alliance Capital Corp., 21525, 28876, 38148
American Business Capital Corp., 2681, 13650
American Indian Investment Opportunities, Inc., 26172
American Small Business Assistance Corp., 20068
American-Euro Interfund Corp., 55
Amistad DOT Venture Capital, Inc., 60362
Arlington Venture Capital Corp., 47339
Associates Venture Capital Corp., 20068, 30633
Aurora Business Capital Corp., 37782
Baltimore Business Investment Co. et al., 55301
BBS Equities Ltd., 16232, 42052
BCJ Capital Enterprises, Inc., 35137
Beauhan Minority Investment Corp., 14368
Benson Investment Co., Inc., 26172, 42052
Bohlen Capital Corp., 32485
Business Ventures, Inc., 25398
Caddo Capital Corp., 52795
California Coastal Equities, Inc., 56304, 58243
Cameron Financial Corp., 47805
Canaveral Capital Corp., 14368
Cannon Capital Corp., 22119
Capital Assistance Corp. of Connecticut, 10454, 19091
Capital Designs, Ltd., 32485
Capital for Terrebonne, Inc., 6665
Capital Formation MESBIC, Inc., 22120
Capital Investment Co. of Washington, 42326, 56301
Capital Management & Resources, Inc., 22120
Capital Marketing Corp., 9400, 16232, 17434
Capital Opportunities for Minority Enterprises, Inc., 35568
Capital-Management Services, Inc., 56301
Capitol Area Investors, Inc., 2681, 14196
Cascade Capital Corp. et al., 39203
Chandler Phillips Capital Corp., 56970
Chinese Investment Corp. of California, 47806
Christopher Small Business Investment Co., 32485
Cinema Fund, Inc., 7079, 59195
City Capital Investors Corp., 25398
CMNY Capital Co., Inc., 17434
Cohen Capital Corp., 13651
Columbia Ventures, Inc., 3451
Cominvest of Hartford, Inc., 48749
Consumer Growth Capital Inc., 10454
Control Data Community Ventures Fund, Inc., 56302
Corporate Capital, Inc., 42053, 52795
Cotton Belt Investment Corp., 38654
Crocker Capital Corp., 47806
Crocker Ventures, Inc., 47806
Crown Venture Capital Corp., 51158
CVC Capital Corp., 14369
Dadeland Capital Investment Corp., 30634, 49872
Dearborn Capital Corp., 50768
DeStan Capital Corp., 31253
Eastern Seaboard Investment Corp. et al., 56302
Energy Investments, Inc., 10751
European Development Capital Corp., 45660
Exim Capital Corp., 54152
F&F Venture Capital Corp., 50769
Federated Capital Corp., 32908, 56303
Fincastle Investment Corp., 56
First Capital Corp. of New Mexico, 22120, 39203
First General Capital Corp., 47807
First Wall Street Small Business Investment Co., Inc., 32486, 42053
First Washington Capital Corp., 2250
Florists Capital Corp., 42053
Fong Venture Capital Corp., 46615
Fulcrum Venture Capital Corp., 22121, 32486
Fundex Capital Corp., 8604, 28066
Futura Capital Corp., 59561
Great American Capital Investors, Inc., 24927, 50276
Great Eastern Financial Corp., 24761
Hellman, Gal Capital Corp., 47807
Hub Enterprises, Ltd., 28876, 43081
Imperial Ventures, Inc., 45661
Indianapolis Business Investment Corp., 17435
Intergroup Venture Capital Corp., 12981, 36744
International Film Investors, L.P., 45661, 58128
Interstate Venture Capital Corp., 37293
Jermyn Venture Capital Corp., 24927, 49872
Jets Venture Capital Corp., 54314
Labaron Capital Corp., 19092
Landers Capital Corp., 20069, 39203
M Venture Capital Corp., 35419
Mansfield Capital Corp., 60363
MDC Capital Corp., 45661
Merchants Finance Co., Inc., 5909
Merit Funding, Inc., 15379, 29390
Metro-Detroit Investment Co., 17435, 26511
Miami Capital Corp., 32486, 49599
Montgomery Street Partners, Inc., 43081
Montgomery Street Partners Corp., 52796
Mountain Ventures, Inc., 52796
National City Capital Corp., 55830
Neighborhood Fund, Inc., 19489
Nevada-California Business Ventures, Inc., 34857
New Court Ventures, Inc., 19093, 29391
New England Capital Resources Corp., 16584, 47807, 60362
New Horizons Capital Corp., 33356
North Star Ventures, Inc., 52567
North Street Capital Corp., 4700
Nutmeg Capital Corp., 52796
Oceanic Capital Corp., 52797
Orangeco Investment Co., 25755
P.R. Peterson Venture Capital Corp., 31253, 56303
Pan American Capital Corp., 21962
Percival Capital Corp., 42053
Peter J. Schmitt SBIC, Inc., 39881, 51159
Producers Capital Corp., 4305
Quidnet Capital Corp., 25399, 30634
Rice Country Capital, Inc., 37049, 55025, 56303
Rio Investment Corp., 9401
Sagera Venture Corp., Inc., 16233
San Antonio Venture Capital, Inc., 20069
San Jose Capital Corp., 30634
Savings Venture Capital Corp., 22121, 52797
SCI Media Ventures, Inc., 19489, 35419
Seafirst Capital Corp., 60363
Sharon Small Business Investment Co., 49873
Small Business Improvement Co., 23667
Small Business Investment Capital, Inc., 4305, 11878, 22121, 54152
Small Business Investment Company of America, 52568
Southwest Financial Corp., 59945
Sprout Capital Corp., 22122
Super Market Investors, Inc., 55830
Suwannee Capital Corp., 33984
Tax Investments Concepts, Inc., 56303
TDH Capital Corp., 49599
Telesciences Capital Corp., 44581
Tennessee Equity Capital Corp., 52568
Tri-State MESBIC, Inc., 16233
Tyler Refrigeration Capital Corp., 17436
Union Ventrue Corp., 47808

Universal Financial Services, Inc., 29877, 45662
Universal Investment Corp., 60361
Universal Lending of America, Inc., 60361
Venture Opportunities Corp., 40583, 59195
Verde Capital Corp., 45662, 57208
Vicksburg Small Business Investment Co., 21087
West Coast Venture Capital, 56304
Western Bancorp Venture Capital Co., 23780, 39204
Authority delegations:
Administration, Assistant Administrator; grants, etc., 17434
Administrator; order of succession, 36744
Disaster Office Supervisory Loan Specialist, 6667
Field offices, program activities, 55, 1577, 10998, 13651, 22261, 36152, 45662, 46914, 55220, 58243
Financing Office, Director, et al., 57207, 58243
Management Services Office, Director; grants, etc., 17435
Operations, Associate Administrator; disaster activities, 37048
Operations, Deputy Associate Administrator et al.; disaster activities, 37048
Committees; establishment, renewals, terminations, etc.:
Advisory Councils, Regions I-X, 5909
Disaster areas:
Alabama, 4892, 6666, 20591, 22119, 27270, 39880
Alaska, 56304
Arizona, 12140, 13650, 15025
Arkansas, 3188, 7387, 19091, 21961, 44580, 46615
California, 2470, 6665, 8603, 9401, 9546, 12418, 14196, 15378, 20591, 40582, 42052, 49872, 52083
Connecticut, 6665, 8604, 16583
Florida, 6666, 40583
Georgia, 6666, 23068, 30634
Hawaii, 24641
Idaho, 2682, 3784, 6667, 18617, 19745
Illinois, 23068, 31253, 32908, 46615, 49873
Indiana, 3188, 10454, 15378, 20591, 29876, 42054
Iowa, 6667, 9401, 9546, 52566
Kansas, 2966, 3784, 4892, 5909, 8604, 12140, 16232, 19091, 20591, 23068, 29204, 35777
Kentucky, 7387, 22261, 59561
Louisiana, 3188, 8604, 12141, 13651, 16583, 20069, 21961, 23068, 29204, 32006, 45661, 52083, 55025, 59561, 61061
Maine, 4892, 8605, 9401, 17435
Massachusetts, 6666, 8605, 10455, 16583, 27270
Michigan, 8605, 16233, 19092, 29204, 32487, 42326, 43593, 58691
Minnesota, 20069, 33984, 35568, 35777
Mississippi, 2967, 6667, 10455, 12141, 20592, 24641
Missouri, 6667, 12774, 13456, 15025, 32908
Montana, 26172, 28066
Nebraska, 4892, 6666, 10455, 11879, 14368, 16584, 19092, 20592, 33356, 39880, 51885, 58692
New Hampshire, 9401, 16584
New Jersey, 5909, 7387, 8605, 9546, 37294, 45662
New York, 9401, 12774, 13456, 15379, 25755, 38149, 39880, 49599
North Carolina, 6666, 40583
North Dakota, 19093, 20592, 33984
Northern Mariana Islands, 50276
Northern Mariana Islands of the Pacific, 39880
Ohio, 15379, 26173
Oklahoma, 28066, 52567, 60362
Oregon, 2682, 3784, 6666
Pennsylvania, 10455, 35777, 42326
Puerto Rico, 53522
Rhode Island, 3784, 6666, 9401, 19093, 22261, 37294, 57715
South Carolina, 6666, 39880
South Dakota, 21961, 28877, 34857, 35777, 38149
Tennessee, 3784, 4892, 9546, 10455, 16584, 18618, 42327, 54153
Texas, 16584, 20070, 23667, 24641, 26173, 26511, 27271, 29205, 30634, 33984, 35777, 37049, 37294, 38656, 39881, 40583, 43593, 47339, 48750, 50769, 52797, 58692, 59453
Vermont, 47808
Virginia, 6667, 9546, 20070, 21961, 24761, 27937, 39204
Washington, 2251, 3784, 6667, 52568, 58692
West Virginia, 5910, 25399
Wisconsin, 8606, 15379, 20882, 32006, 35778, 43593, 47808
Wyoming, 26173
Improving Government regulations; inquiry, 22605
Lending institutions; maximum interest rates, 13651
Loans, handicapped assistance, local development company, and business; waiver of administrative ceiling, 19489, 42054
Loans, handicapped assistance and business; waiver of administrative ceilings; radio or TV, 9211
Loans and revolving line credit; maximum interest rates, 24761, 52343, 47035
Meetings; advisory councils:
Albuquerque, 39204
Atlanta, 35419, 35568
Augusta, 47339
Baltimore, 36743
Birmingham, 53522
Boise, 38656
Boston, 35137, 47338
Casper, 37294
Charlotte, 36025
Chicago, 43592
Clarksburg, 46616
Cleveland, 44581
Columbia, 35419
Columbus, 38148
Concord, 43081
Dallas, 38149, 38655
Denver, 34857, 36743
Des Moines, 36743
Detroit, 43592
Fargo, 43081
Harlingen, 38655
Hartford, 42326
Hato Rey, 39204
Helena, 35777
Honolulu, 36025
Houston, 38655
Indianapolis, 49599, 49873
Jackson, 37294
Kansas City, 36025, 36337, 43081
Las Vegas, 38656
Little Rock, 37048
Los Angeles, 38655
Louisville, 42054
Lubbock, 38149
Madison, 36025
Miami and Jacksonville, 29877
Minneapolis, 38149
Montpelier, 39203
Nashville, 36153
National, 13651
New Orleans, 42054, 47807
New York, 44580, 48750
Newark, 43592
Oklahoma City, 36743
Omaha, 37294
Philadelphia, 54152
Phoenix, 46616
Pittsburgh, 37782
Portland, 38149
Providence, 38655
Richmond, 36336
Salt Lake City, 36744
San Antonio, 37048
San Diego, 36025
San Francisco, 42326, 49873
Seattle, 39204, 49873
Sioux Falls, 43081
Spokane, 39881
St. Louis, 38655
Syracuse, 44580
Washington, D.C., 36743
Wichita, 37294
Region I Executive Board, 3452, 13652
Region II Executive Board, 1863, 3452
Region III Executive Board, 1863, 3452
Region IV Executive Board, 1863, 3452
Region V Executive Board, 2682
Region VI Executive Board, 1863, 3452
Region VII Executive Board, 1863, 3453
Region VIII Executive Board, 2470
Region IX Executive Board, 3453
Region X Executive Board, 3453
Mergers and take-overs; United Technologies Corp.; hearing, 50276
Privacy Act; systems of records, 8605, 19744
Privacy Act; systems of records; annual publication, 45969

## SOCIAL AND ECONOMIC STATISTICS ADMINISTRATION

*See Census Bureau.*
*Economic Analysis Bureau.*

## SOCIAL PROGRAMS

*See ACTION.*
*Community Services Administration.*
*Food and Nutrition Service.*
*Health, Education, and Welfare Department.*
*Human Development Services Office.*
*Social Security Administration.*

## SOCIAL SECURITY ADMINISTRATION

**RULES**

Aged, blind, and disabled; supplemental security income for:
Benefits; reductions, suspensions, and terminations, 18170
Disability claims, vocational evaluation policy, 55371
Eligibility; individuals in publicly operated community residences, 4006, 11983, 55381
Gainful activity, substantial; guidelines, 1940, 29938

Income, exclusion from; assistance based on need furnished by States or political subdivisions, 48995
Income, unearned; support and maintenance for residents of certain households or instituitions, 29279, 29283, 30271
Income deeming, 39567, 54235
Indian tribes, receipts from lands held in trust for; exclusion from countable income and resources, 45555
Northern Mariana Islands; special age 72 benefits, 25091, 25815
Presumptive disability and blindness; basis for findings and payment, 17354
Rehabilitation services; referral of blind and disabled, 27180
Black lung benefits:
Claims, pending and denied; review, 34780
Child support enforcement program; good cause for refusal to cooperate, 2176, 15424, 45747
Demonstration projects; AFDC employment opportunities, etc., 53730
Financial assistance programs:
Eligibility; Indian tribes, receipts from lands held in trust for; income exclusion, 45586
Information and official records disclosure:
Aid to families with dependent children; State and local government agencies and officials administering program; inquiry, 3907, 25672
Old-age, survivors, and disability insurance:
Amount payable determinations, pre-1951 wage basis; subsequent actuarial reduction of benefit increases, 33706
Basic computation of benefits and lump sums, new methods; interim rules, 60877
Blindness, person disabled by; substantial gainful activity guidelines, 30047
Claims, currently filed; obsolete regulations deleted, 8127
Delayed retirement; widow's and widower's insurance benefits increase, 29276
Deletion of out-of-date regulations; correction, 3703, 12675
Deposit requirements for State and local governments, 54087
Disability cases with common issues; consolidation of hearings, 4974
Disability claims, vocational evaluation policy, 55362
Evidence for proof of eligibility, 24794
Gainful activity, substantial; guidelines, 1940, 29938
Income from self employment of limited partner; exclusion, 20972, 21880, 25422
Northern Mariana Islands; special age 72 benefits, 25091, 25815
Overpayment, recovery; etc., 31318
Payment of benefits to aliens outside of U.S., 2628
Quarters of coverage, crediting to calendar years, 34777
Religious or charitable organizations, etc.; filing waiver of tax exemption, 45346
Retirement test, 53714, 58814
Wage reporting, annual; effects of requirement, 56037
Worker's spouse eligible for government pension, benefits payable to; reduction, 34456
Organization and procedures; social security numbers issuance, 20974
Public assistance programs:
Application, eligibility determination and furnishing of assistance; information dissemination on public assistance, 6950
Quality control; review cycle and case error temporary exemption, 2631
Social Security Act disallowances reconsidered, 9266

**PROPOSED RULES**

Aged, blind, and disabled; supplemental security income for:
Disability claims, vocational factors, 9284, 19238
Disability claims evaluation, medical criteria; revised, 29955
Disability evaluation; inquiry, 11714
Disaster relief assistance; exclusion from income; advance notice, 12033
Evidence of permanent residence in U.S. under color of law, 21012
Filing date protection for SSI inquirers; advance notice, 12033
Food stamps, filing at SSA offices; inquiry, 8555
Gainful activity, substantial, guidelines, 1964
Household goods, personal effects, and automobile, increasing reasonable value, 18206
Indian tribes, receipts from lands held in trust for; exclusion from countable income and resources, 18205
Medical and social services; income exclusion, 15336, 41054
Oral inquiry and written application; filing date, 27853, 30574
Quality assurance; erroneous payment, Federal fiscal liability, 29311, 36478
Replacement of damaged, lost, or stolen resources; income exclusion; advance notice, 18699
Representation of parties; appeals and determinations, 49545
Resident, definition; withdrawn, 33258
Resources evaluation; equity value basis, 18698, 21465
Substantial gainful activity guidelines for 1978 and 1979; advance notice, 51410
Black lung benefits:
Claims, initial review, payment reductions, etc.; advance notice, 15336
Claims, pending and denied; review, 24542
Child support enforcement program; good cause for refusal to cooperate; hearing, 15457
Financial assistance programs:
Aid to families with dependent children; absence of parent; advance notice, 35511
Aid to families with dependent children; budgeting income methods, 45888
Aid to families with dependent children; protective, vendor, and two-party payments; advance notice, 21015
Grants to States, 38318
Prior month budgeting, monthly reporting and income averaging; withdrawn. 45887
Old-age, survivors, and disability insurance:
Amount payable determinations for qualifying individuals; advance notice, 12033
Applications, filing of, 25695, 39266
Benefits; eligibility requirements, determination of amounts, etc., 52936, 54666
Benefits; maximum for years after 1978; new formula, 60956
Child's benefits; entitlement and reentitlement, 59848
Disability claims, vocational factors, 9284, 19238
Disability claims evaluation, medical criteria; revised, 29955
Disability evaluation; inquiry, 11714
Disability insurance program; substantial gainful activity guidelines for blind; advance notice, 12031
Earning test changes; elimination of monthly measure; advance notice, 36110
Earnings records; correction procedures, 55414
Gainful activity, substantial, guidelines, 1964
International social security agreements; totalization; bilateral agreements with foreign countries, 19863, 60292
Old-age and survivors program: nonprofit organizations coverage; advance notice, 12032
Pension offset to dependents' benefits; advance notice, 12032
Recodification, advance notice, 42017
Representation of parties; appeals and determinations, 49545
State and local governments; deposit requirements, frequency, 13395
Substantial gainful activity guidelines for 1978 and 1979; advance notice, 51410
Transfer and recodification; reference changes, 25837
Wage reporting, annual; advance notice, 12032
Wage reporting, annual; State and local governments, 35344, 50700
Wage reporting, annual; State and political subdivisions; advance notice, 12032
Wages and self-employment income; records maintenance; advance notice, 36110
Organization and procedures:
Transfer and recodification; reference changes, 25837
Public assistance programs:
Fiscal incentives for lowering AFDC error rates; inquiry, 8562
Grants to States, policies and procedures; recodification decision, 7672
Prior month budgeting, monthly reporting and income averaging; withdrawn, 45887
Quality control system; erroneous payments for AFDC, Federal financial participation, 29311, 36478
Quality control system; incentive adjustment for AFDC, Federal financial participation, 54105
State demonstration work projects, special; inquiry, 11719

**NOTICES**

Aged and disabled, supplementary medical insurance:
Actuarial and premium rates (July 1979-June 1980), 61010
Benefits computation; table of average total wages year by year, 61016

Committees; establishment, renewals, terminations, etc.:
Social Security Advisory Council; appointment, 10636
Demonstration projects; WIN program requirements waiver for AFDC recipients age 16 and 17, 58231
Demonstration projects relating to public service employment, training, work incentives, etc.; guidelines availability, 36005
Improving Government regulations; inquiry, 23138
Income maintenance research and demonstration grants; availability, 17061
Indo-chinese refugees:
Funding for English language and employment services; availability, 11859, 22077
Mental health projects, 22080, 30127
Meetings:
Social Security Advisory Council, 10636, 17870, 38115, 39608, 45480, 45920, 50253, 55825, 58638
Organization, functions, and authority delegations:
Acting Commissioner; income maintenance program functions, 33823
Deputy Commissioner et al., 40549
Deputy Commissioner et al.; supplemental security income, State administrative reimbursements, etc., 43390
Deputy Commissioner et al.; supplemental security income benefit overpayments, 47614
Social Insurance Claims Examiner; Program Operations Office, Guam Branch, 57349
Public assistance programs:
Virginia State plan amendment, 35397, 40062
Social security contribution and benefit base increase, 53504
Women, treatment under social security; inquiry, 10734

## SOIL CONSERVATION SERVICE

### RULES

Contracting, long term:
Rural abandoned mine program, 44750
Rural clean water program, 50855
Freedom of information, 34756
Privacy Act; implementation, 34756
Support activities:
Archeological and historical properties; protection procedures, 26277, 27158
Farmlands, prime and unique; inventory, etc., 4031
Technical standards; availability, 58079
Water resources:
Watershed projects; deuthorization of funds, 4030

### PROPOSED RULES

Contracting, long term:
Rural abandoned mine program, 15312, 19235
Rural clean water program, 26740
Regulatory impact analysis, 15312
Support activities:
Landrights, water rights, and construction permits; acquisition requirements, 53443
NEPA compliance; floodplain management, 24223
Water resources:
Emergency watershed protection program; inquiry, 58192
Wetlands protection; policy statement, 28787

### NOTICES

Channel modification in water resource projects; guidelines, 8276
Environmental statements on watershed projects; availability, etc.:
ADA Municipal Airport Critical Area Treatment RC&D Measure, Okla., 2197
Adams County Roadside Critical Area Treatment RC&D Measure, Ohio, 31959
Agassiz Lake Critical Area Treatment RC&D Measures, N. Dak., 14702
Agriculture-Related Pollutant Control RC&D Measure, N. Mex., 11245
Alcona County Park Critical Area Treatment RC&D Measure, Mich., 14699
Alderson-Broaddus College Critical Area Treatment RC&D Measure, W. Va., 8163
Alpena County Roads, King's Landing RC&D Measure, Mich., 14327
Altoona Pigeon Bluff, Public Water-Based Fish and Wildlife RC&D Measure, Wash., 1972
Arthur Dodd Memorial Roadside Park Water-Based Recreation RC&D Measure, Mich., 36496
Atwater Lakes and Parks Public Water-Based Recreation Development RC&D Measure, Minn., 3294
Back Creek Reservoir Critical Area Treatment RC&D Measure, N.C., 14699
Badger Creek, Iowa, 13083
Baraga County Roads Critical Area Treatment RC&D Measure, Mich., 23621
Barlow Fairgrounds RC&D Measure, Ohio, 8164
Bastian Elementary School Land Drainage RC&D Measure, Va., 24341
Bayou Mallet Watershed, La., 53050
Bayshore Park RC&D Measure, Mich., 2645
Bear Lake County Park Water-Based Recreation RC&D Measure, Wash., 39163
Bear Lake Water-Based Recreation RC&D Measure, Utah, 1972
Beartown Flood Prevention RC&D Measure, Miss., 17512
Beaverdam Creek, Watershed, S.C., 10949
Belmont County Fairgrounds RC&D Measure, Ohio, 8164
Belmont Critical Area Treatment RC&D Measure, N.H., 15758
Bicentennial Park Public Water-Based Recreation RC&D Measure, Ind., 5399
Big Sandy Creek, Tex., 18584
Big 8 RC&D Area Critical Area Treatment RC&D Measures, Tex., 33276
Bigelow Park Land Drainage RC&D Measure, Maine, 24082
Black Hills RC&D Critical Area Treatment RC&D Measures, S. Dak. & Wyo., 17512
Briar Creek Watershed, Pa., 55810
Bridgeton City Park Public Water-Based Recreation RC&D Measure, N.J., 6115
Briscoe Floodwater Retarding Structure RC&D Measure, Nebr., 42774
Bristol-Plymouth Regional Vocational Technical School Drainage RC&D Measure, Mass., 40047
Broad Brook Project, Mass., 46055
Brodhead Elementary School Land Drainage RC&D Measure, Ky., 39163
Brushy-Peaceable Creek, Okla., 35086
Buck Creek, Ala., 2645, 42287
Buffalo ISD Erosion Control RC&D Measure, Tex, 14328
Bullbeggar Creek Flood Prevention and Drainage RC&D Measure, Va., 20829
Burkesville Water-Based Recreation RC&D Measure, Ky., 14699
Burnham Creek, Minn., 4079
Burton ISD Erosion Control RC&D Measure, Tex., 14700
Cadron Creek Watersheds, Ark., 8276
Camp Barbe 4-H Camp Land Drainage RC&D Measure, W. Va., 14700
Cane Creek, Okla., 33778
Carrabelle Recreation RC&D Measure, Fla., 14327
Cave Springs School Critical Area Treatment RC&D Measure, Okla., 8164
Cayuga Land Drainage RC&D Measure, Inc., 15759
Cedar Creek Water-Based Recreation RC&D Measure, Fla., 30320
Chalk Bluff Public Water-Based Recreation RC&D Measure, Ark., 40895
Chariton Valley RC&D Area Critical Area Treatment Measures, Iowa, 14700
Charles Fork Public Water-Based Fish and Wildlife Recreation RC&D Measure, W. Va., 28527
Charlevoix City Park Critical Area Treatment RC&D Measure, Mich., 23621
Cherry County Roadside Critical Area Treatment RC&D Measure, Nebr., 8165
Chickasaw-Shiloh RC&D Critical Area Treatment RC&D Measures, Tenn., 17513
Clearwater R-1 School Critical Area Treatment RC&D Measure, Mo., 19252
Clemente Gravel Pit Critical Area Treatment RC&D Measure, N.J., 28020
Coal Creek, Okla., 14701
College Farm Erosion Control RC&D Measure, Tex., 24342
Colorado County Roadside Erosion Control RC&D Measure, Tex., 24342
Columbia County High School Critical Area Treatment and Land Drainage RC&D Measure, Fla., 34174
Conneautville Flood Prevention RC&D Measure, Pa., 25701
Cook AA Critical Area Treatment RC&D Measure, N.J., 8165
Coosa Valley Critical Area Treatment RC&D Measures, Ala., 14328
Corrales Watershed, N. Mex., 29821
Cotton-Coon-Mission Creek, Okla., 31189
County Road 1000 South Critical Area Treatment Measure, Ind., 3294
Cow Creek Critical Area Treatment RC&D Measure, Calif., 17513

Cumberland Valley RC&D Area Critical Area Treatment RC&D Measures, Ky., 23621
Darrs Creek, Tex., 46055
De-Go-La RC&D Area Critical Area Treatment RC&D Measures, Tex., 30320
Delaware Creek, Okla., 15759
Delta County Roads Critical Area Treatment RC&D Measure, Mich., 28527
Doniphan R-1 School Critical Area Treatment RC&D Measure, Mo., 15758
Drainage District No. 8, Pemiscot County Critical Area Treatment RC&D Measure, Mo., 19252
Dry Creek, Kans., 46984
Dubois County Critical Area Treatment (Tree Planting) Measure, Ind., 3295
East Carroll, La., 19253
East Fork Buck Creek Critical Area Treatment RC&D Measure, Ohio, 40047
East Jordan Harbor RC&D Measure, Mich., 2198
East Wharton Outfall Erosion Control RC&D Measure, Tex., 24083
Eastern Carter County R-2 School District Critical Area Treatment RC&D Measure, Mo., 19253
Eastern Connecticut Critical Area Treatment RC&D Measures, Conn., 24082
Elbert School District Critical Area Treatment Measure, Colo., 3295
Empire Canal Farm Irrigation RC&D Measure, Colo., 2646
End of Point Abbaye Natural Area Public Water-Based Fish and Wildlife RC&D Measure, Mich., 23622
Fifield Hill Critical Area Treatment RC&D Measure, Mich., 36496
Fish stream et al., Maine, 50952
FM 830 Boat Ramp Recreation Development RC&D Measure, Tex., 42774
Fort Stanton Farm Irrigation RC&D Measure, N. Mex., 25702
Four Corners Critical Area Treatment RC&D Measure, Colo., 24342
Fowler and Prairie Creek Park Critical Area Treatment RC&D Measure, Ind., 20828
Fulton-Izard-Sharp Counties Critical Area Treatment RC&D Measure, Ark., 15759
Geode Wonderland RC&D Area Critical Area Treatment Measures, Iowa, 10712
George Munroe Elementary School Critical Area Treatment RC&D Measure, Fla., 34174
George Stevens Academy Critical Area Treatment Measure, Maine, 30321
Gilmer County Fisherman Access Public Water-Based Fish and Wildlife and Recreation RC&D Measure, W. Va., 10712
Gogebic County Critical Area Treatment RC&D Measure, Mich., 17513
Golden Sands RC&D Area Roadside Erosion Critical Area Treatment RC&D Measures, Wis., 10949
Gouldsboro Elementary School Critical Area Treatment RC&D Measure, Maine, 24082
Green River RC&D Area Critical Area Treatment RC&D Measures, Ky., 28021
Greenville High School Land Drainage RC&D Measure, Ky., 39164
Hamilton Creek, Tex., 25701
Hancocks Bridge Water-Based Recreation RC&D Measure, N.J., 37476
Hardy Lake Public Water-Based Fish and Wildlife RC&D Measure, Ind., 10950
Harrison County Fairgrounds Land Drainage RC&D Measure, Ind., 30321
Hayden Flood Prevention RC&D Measure, Colo., 14328
Heart Mountain Estates RC&D Measure, Wyo., 3295
Henderson County Roadside Critical Area Treatment RC&D Measure, Tenn., 8165
Hermitage Public School Critical Area Treatment RC&D Measure, Ark., 46057
Highway District 9 Critical Area Treatment RC&D Measure, Vt., 20829
Homer Airport Critical Area Treatment RC&D Measure, La., 6116
Hoyle Creek, Okla., 14701
Hull Bay Water-Based Recreation RC&D Measure, V.I., 3296
Hungry Hall RC&D Measure, S.C., 2198
Huntingburg Airport Critical Area Treatment RC&D Measure, Ind., 14701
Hurricane Road Critical Area Treatment RC&D Measure, N.Y., 47586
Illiana Church Camp Critical Area Treatment RC&D Measure, Ind., 24343
Indian Creek-Van Buren project, Iowa and Mo., 46985
Indian Lake School Land Drainage RC&D Measure, N.Y., 17514
Jacks Creek Flood Prevention and Drainage RC&D Measure, Va., 20829
Jackson County Roadside Critical Area Treatment RC&D Measure, Ohio, 35086
Jefferson County High School Critical Area Treatment RC&D Measure, Fla., 36497
Johnson Lake Public Water-Based Recreation RC&D Measure, Ind., 25702
Just-Olson Critical Area Treatment RC&D Measure, Wis., 24343
Keys School Critical Area Treatment RC&D Measure, Okla., 5556
Kings's Mark RC&D Area Critical Area Treatment RC&D Measures, Conn., 31959
Kusel Lake Park Recreation RC&D Measure, Wis., 14702
Lake Gerar Park RC&D Measure, Del., 2646
Lake Van Public Water-Based Recreation RC&D Measure, N. Mex., 30321
Lake Washington Critical Area Treatment RC&D Measure, Miss., 35086
Laurel River Park Water-Based Recreation RC&D Measure, Del., 43745
Lea County State Park Public Water-Based Recreation RC&D Measure, N. Mex., 24343
Lee County Critical Area Treatment RC&D Measure, S.C., 5556
Lenox Memorial High School Flood Prevention and Drainage RC&D Measure, Mass., 17514
Leutzinger-Lowe Run Watershed, Iowa, 36497
Lewis & Clark 1805 Critical Area Treatment RC&D Measures, N. Dak., 15173
Lincoln County Roadside Critical Area Treatment RC&D Measure, Kans., 5556
Line Creek, Ala., 2646
Little and Middle Patuxent River, Md., 32443
Little Crooked Creek Critical Area Treatment RC&D Measure, La., 24344
Little Grave Creek, W. Va., 28021
Little Tallahatchie River, Miss., 35970
Little Walnut Creek Project, Inc., 25702
Little Wyaconda-Sugar Creek, Mo., 18584
Lower Elk River Supplemental Plan No. 1, Kans., 46985
Lower James Critical Area Treatment RC&D Measures, S. Dak., 14329
Lower Middle Fabius, Mo., 35087
Lower Queen Creek, Ariz., 3923
Madill School Critical Area Treatment Measure, Okla., 3296
Madison County High School Critical Area Treatment RC&D Measure, N.C., 14329
Mammoth Park Critical Area Treatment RC&D Measure, Pa., 40047
Marlow Miller Park Critical Area Treatment RC&D Measure, Okla., 14329
McLeod County Roadside Critical Area Treatment RC&D Measure, Minn., 15760
McLeod Honor Farm Critical Area Treatment RC&D Measure, Okla., 14702
Medford City Park Creation RC&D Measure, Wisc., 28528
Midwest Institute of Scandinavian Culture, Inc. Critical Area Treatment RC&D Measure, Wis., 24344
Mineral County Fairgrounds Land Drainage RC&D Measure, W. Va., 14703
Mispillion Project Water-Based Recreation RC&D Measure, Del., 46057
Mitchell Swamp-Pleasant Meadow Branch Project, S.C., 46058, 60629
Mon View Park Land Drainage RC&D Measure, Pa., 30322
Monongahela Critical Area Treatment RC&D Measure, Pa., 10949
Monroe-Annabella Watershed, Utah, 6824
Moon Lake Critical Area Treatment RC&D Measure, Miss., 20829
Moore United Gas Gully Critical Area Treatment RC&D Measure, Fla., 46058
Moores Creek, Ala., 2647
Moran Multipurpose Reservoir RC&D Measure, Kans., 35970
Morgan County Roadside RC&D Measure, Ohio, 8166
Morgan County Schools Critical Area Treatment RC&D Measure, W. Va., 8166
Mozingo Creek, Mo., 2647
Mt. Jewett Community Park Land Drainage RC&D Measure, Pa., 17018
Mt. Sterling Cemetery Critical Area Treatment RC&D Measure, Ill., 23620
Mystic Seaport Critical Area Treatment RC&D Measure, Conn., 43745
Nanjemoy Heronry Water-Based Fish and Wildlife RC&D Measure, Md., 39164

Navarino Wildlife Area Critical Area Treatment and Public Water-Based Fish and Wildlife RC&D Measure, Wis., 42775
Negreet High School Critical Area Treatment RC&D Measure, La., 24344
Newlan Creek, Mont., 19253
Newman Lake Watershed, Wash., 27221
Noble Ghost Critical Area Treatment RC&D Measure, Supplement No. 1, Tex., 14330
North Accomack Elementary School Land Drainage and Critical Area Treatment RC&D Measure, Va., 33277
North Central Critical Area Treatment RC&D Measures, N. Dak., 15173
North Central Critical Area Treatment RC&D Measures, S. Dak., 14703
North Central Nebraska RC&D Area Critical Area Treatment RC&D Measures, Neb., 23622
North Fork Forked Deer, Tenn., 2647
North Idaho College Public Water-Based Recreation RC&D Measure, Idaho, 40896
North Lake Creek Flood Prevention RC&D Measure, Oreg., 23623
North Newton School Corp. Land Drainage RC&D Measure, Ind., 5557
North Tyger River, S.C., 37207
North Vermillion School Critical Area Treatment RC&D Measure, Ind., 17019
Northeast Mississippi RC&D Area Critical Area Treatment RC&D Measures, Miss., 46056
Northumberland Flood Prevention RC&D Measure, N.H., 15174
Northwest Mississippi RC&D Area Critical Area Treatment RC&D Measures, Miss., 46056
Oaks Park Farm Irrigation Canal RC&D Measure, Utah, 3296
Oconee River Water-Based Recreation Sites RC&D Measure, Ga., 39164
Ohio County Roadbank Critical Area Treatment RC&D Measure, Ind., 5557
Okaloosa Roadside Critical Area Treatment RC&D Measure, Fla., 34174
Oliver Recreation Facilities, Public Water-Based Recreation RC&D Measure, Nebr., 2198
Onaway Area Community Schools RC&D Measure, Mich., 2199
Otter Lake Public Water-Based Fish and Wildlife RC&D Measure, Wis., 37477
Oyster Water-Based Recreation RC&D Measure, Va., 14703
Panhandle RC&D Area Critical Area Treatment Measures, Nebr., 20828
Parkersburg Community College Land Drainage RC&D Measure, W.Va., 28528
Pathfinder Irrigation District Wyoming No. 2 Lateral Pipeline RC&D Measure, Wyo. and Nebr., 17019
Paw Paw Bottoms Flood Prevention and Land Drainage RC&D Measure, Okla., 39165
Pennyrile RC&D Area Critical Area Treatment RC&D Measures, Ky., 36497
Pere Marquette River Fisherman's Access Site Critical Area Treatment RC&D Measure, Mich., 23622
Petoskey Winter Sports Park Critical Area Treatment RC&D Measure, Mich., 6116
Pierce Park Public Water-Based Recreation RC&D Measure, Idaho, 39165
Pine Creek, Tenn., 49342
Pine Lawn Park Public Water-Based Recreation Development RC&D Measure, Minn., 3297
Pipe Creek RC&D Measure, Ohio, 8166
Plymouth Critical Area Treatment RC&D Measure, N.H., 15760
Portland-Westbrook College Land Drainage RC&D Measure, Maine, 17514
Presque Isle Stream Project, Maine, 34828
Pryor Creek, Okla., 31189
Pymatuning State Park Critical Area Treatment RC&D Measures, Pa., 35087
Quapaw Pow-Pow Grounds Critical Area Treatment RC&D Measure, Okla., 14330
Quiet-Water Beach Water-Based Recreation RC&D Measure, Fla., 36498
Quincy Gullies Critical Area Treatment RC&D Measures, Fla., 36498
Randall Critical Area Treatment RC&D Measures, S. Dak., 14330
Rathbun Wetlands Water-Based Fish and Wildlife Development RC&D Measure, Iowa, 34175
Rattlesnake Creek Watershed Project, Ohio, 10950
Rensselaer Land Drainage RC&D Measure, Ind., 14331
Renville County Roadside Critical Area Treatment RC&D Measure, Minn., 14704
River Country RC&D Area Roadside Erosion Critical Area Treatment RC&D Measures, Wis., 10950
River Road Park Water-Based Recreation RC&D Measure, Ala., 47587
Ronald Rigby Gully Critical Area Treatment RC&D Measure, Fla., 46058
Roosevelt-Custer Critical Area Treatment RC&D Measures, N. Dak., 15174
Rose Gaffney School Land Draining RC&D Measure, Maine, 25702
Rosedale School Land Drainage RC&D Measure, Ind., 17019
Rumford-Smith Crossing Flood Prevention RC&D Measure, Maine, 19254
Rural Abandoned Mine Reclamation Program, 6976
Rural Clean Water Program, 17992
St. Joseph College-Lake Bennett Critical Area Treatment RC&D Measure, Ind., 5557
Salado Creek, Tex., 2417
Salmon Creek Critical Area Treatment RC&D Measure, N.Y., 10712
Salt Lick Creek Watershed Project, Ky., 15760
Sand-Hogshooter Creek Watershed Project, Okla., 14705
Sans Bois Creek, Okla., 8166
Santa Rosa County Roadside Critical Area Treatment Measure, Fla., 36498
Selah and Moxee Irrigation District Farm Irrigation RC&D Measure, Wash., 15761
Senecaville Lake Recreation RC&D Measure, Ohio, 35087
Silva Flat Critical Area Treatment Measure, Calif., 30322
Slate River, Va., 1813
Smithville Elementary School Critical Area Treatment RC&D Measure, Okla., 5558
South Branch-Park River, Conn., 3923
South Central Dakota RC&D Area Critical Area Treatment RC&D Measures, N. Dak., 24345
South Fork of Licking River Watershed Project, Ohio, 10951
South Natchitoches Flood Prevention and Agricultural Land Drainage RC&D Measure, La., 47587
South Putnam School Critical Area Treatment & Land Drainage RC&D Measure, Ind., 15174
South River, Va., 23750
Southeast Mississippi RC&D Area Critical Area Treatment RC&D Measures, Miss., 46056
Southeast Tennessee RC&D Area Critical Area Treatment RC&D Measures, Tenn., 28021
Southern Iowa RC&D Area Critical Area Treatment Measures, Iowa, 10713
Southern Sequoyah County Critical Area Treatment RC&D Measure, Okla., 19254
Southwest Mississippi RC&D Area Critical Area Treatment RC&D Measures, Miss., 46057
Spring Creek, Ala., 2647
Spring Creek, Neb., 6116
Stanley Gully Critical Area Treatment RC&D Measure, Fla., 36499
Stockholm Ballfield Land Drainage RC&D Measure, Maine, 17515
Stockport Land Drainage RC&D Measure, Ohio, 2648
Stucker Fork, Ind., 17992
Sullivan Trail Vegetative Treatment RC&D Measure, N.Y., 30591
Sunman Park Land Drainage RC&D Measure, Ind., 24346
Sunset Coffee Mill Flood Prevention RC&D Measure, Hawaii, 2199
Susan River Greenbelt Critical Area Treatment RC&D Measure, Calif., 30322
Sycamore Trails RC&D Area Cloverdale Community Schools Land Drainage RC&D Measure, Ind., 28528
Talcott High School Critical Area Treatment RC&D Measure, W. Va., 8167
Talladega Creek, Ala., 2648
Ten Mile School Critical Area Treatment RC&D Measure, Tenn., 8167
Tennessee Valley Critical Area Treatment RC&D Measures, Ala., 14704
Three Mile Creek, Iowa, 13083
Tombigbee Critical Area Treatment RC&D Measures, Ala., 14704
Tonkawa Creek Project, Okla., 60629
Trappe River Critical Area Treatment RC&D, Wis., 14705
Triffin Tracts Farm Irrigation RC&D Measure, Mont., 28529
Trinity River, Tex., 49342
Tunkhannock River Street Park Public Water-Based Recreation and Critical Area Treatment RC&D Measure, Pa., 40896
Turkey Creek Watershed Project, Okla., 14705

Tyler, Minn., 4080
Tyrrell County Elementary School Flood Prevention and Land Drainage RC&D Measure, N.C., 8167
University of West Florida Critical Area Treatment RC&D Measure, Fla., 36499
Upper Big Swamp Creek, Ala., 46557
Upper Middle Fabius, Mo., 35087
Upper Yocona River Watershed, Miss., 39599
Versaille Road-David Zimmerman Critical Area Treatment RC&D Measure, Ill., 23620
Village of Frederic Flood Prevention RC&D Measure., Mich., 14331
Warner Draw Project, Utah, 34828
Warrington Middle School Critical Area Treatment RC&D Measure, Fla., 34175
West Clinton Flood Prevention RC&D Measure, Ind., 42775
West Franklin Watershed, La., 53050
Westfield Borough Flood Prevention RC&D Measure, Pa., 19254
White's Mill RC&D Measure, S.C., 14705
Whitney Irrigation District Distribution System Farm Irrigation RC&D Measure, Nebr., 39165
Willow Swamp, S.C., 33779
Wiregrass RC&D Area Critical Area Treatment RC&D Measures, Ala., 10713
Wirt County High School Recreation Area Land Drainiage RC&D Measure, W. Va., 10713
Woolsey Memorial Airport Land Drainage RC&D Measure, Mich., 19057
Worthington School Land Drainage RC&D Measure, W. Va., 8168
Wythoughan Park Land Drainage RC&D Measure, Ind., 5558
Yazoo River, Miss., 35970
Improvement works installation; Federal assistance authorized, 49555, 53050
Improving Government regulations; inquiry, 21992
Meetings:
Soil and water resources conservation, 36495
Soil and water resources conservation; implementation activities; guidelines, 24345
Soil and water resources conservation; meetings, 36495
Watershed planning assistance; authorization to local organizations:
Alabama, 29340
Arkansas, 45622
Kansas, 29340, 51434
Mississippi, 45622
Missouri, 45622
Nebraska, 45622
New York, 51434
Ohio, 45910
Oklahoma, 45622
Oregon, 33277, 45622
Utah, 45910
Vermont, 45910
Virginia, 45622
Watershed projects; deauthorization of funds:
Broad Brook Watershed, Mass., 27574

## SOUTHEASTERN POWER ADMINISTRATION

### NOTICES

Cumberland Basin Projects; power rates and charges, revision, 17043
Marketing policy; public participation procedure, 8285, 15186, 29186

## SOUTHWESTERN POWER ADMINISTRATION

### NOTICES

Power rates and charges; public forums, 16545, 25865, 36514

## STATE DEPARTMENT

*See also Agency for International Development.*

### RULES

Conduct standards, 18976
Increased per diem allowances to foreign participants, 14456
Employment, civilian; acceptance from foreign governments by members of uniformed services; procedures for approval, 55393
International educational and cultural exchange:
Alien physicians; exchange-visitor program, 13505
Cultural exchange programs of foreign countries; participation by Federal employees, 42247
Passports:
Persons included; photographs; minors 13 years or older, 3090
Procurement, 50682
Security information regulations, 55944
Visas:
Immigrants, documentation; consular officer standards, 59837
Immigrants, documentation; numerical controls, 51013
Immigrants, documentation; prearranged employment offers, 50423
Immigrants, documentation; technical changes, 19649
Nonimmigrants, documentary waivers, 54928
Nonimmigrants, documentation; consular officer statements, 59837

### PROPOSED RULES

Compulsory liability insurance for diplomatic missions and personnel, 57159
Employment acceptance from foreign governments by retired and reserve officers; procedures for approval, 23593
Passports:
Personal appearance for certain applicants abroad, waiver; photographs, 51410
Persons included; photographs; minors 13 years or older, 1791
Privacy Act, implementation, 46046
Visas:
Immigrant; aliens ineligible, withdrawn, 24547

### NOTICES

Art objects, importation:
Egyptian Tutankhamun collection; extension of stay, 14561
Italy, culturally significant objects from, 9665
Romania, culturally significant objects from, 14561
Authority delegations:
Administration, Assistant Secretary, 50529
Deputy Secretary et al.; nuclear non-proliferation, 13456, 25213
European Affairs, Assistant Secretary; controlled Baltic assets, 39624
International Narcotics Matters, Assistant Secretary, 50529
Legal Advisor; warrants, fugitives extradited to U.S., 50981
Nuclear Energy and Energy Technology, Deputy Assistant Secretary, 13457
Oceans and International Environmental and Scientific Affairs, Assistant Secretary, 18079
Committees; establishment, renewals, terminations, etc.:
World Administrative Radio Conference, 19746
Compulsory liability insurance for diplomats; meeting, 50066
Cuba/U.S. maritime boundary treaty, 1659, 8606
Environmental statements; availability, etc.:
Antarctic Living Marine Resources Conservation Regime, 4475, 14560, 23780
International Convention for High Seas Fisheries of North Pacific Ocean, renegotiation, 20288
Narcotics control in Mexico, 59946
Waste incineration at sea, 46616
Exchange-visitor skills list; revision, 5910
Financial assistance to participants in State Department proceedings; inquiry, 37785
Fishery conservation zone; limits establishment, 1658
Fishing; 1978 foreign fishing allocations, 18382
Fishing permits, applications:
Bulgaria, 18132, 49462
China, Republic of, 7542, 53126
Cuba, 11478, 18132, 22314, 53126
France, 35434
German Democratic Republic, 53126
Germany, 38530
Italy, 53126
Japan, 6008, 7414, 11478, 15272, 18132, 26684, 29902, 31802, 35434, 42956, 49462, 53126
Korea, 6008, 7542, 19334, 56415
Mexico, 6008, 19334, 22314, 26684, 29902, 38530, 49462, 56415
Poland, 7542, 22314, 31802, 42956, 53126, 56415
Romania, 42956, 49462
South Korea, 49462
Spain, 3874, 15272, 53126
Union of Soviet Socialist Republics, 1908, 3874, 7542, 15272, 18132, 22314, 26684, 29902, 53126
Improving Government regulations, 22589, 54709
International Atlantic tuna conservation convention; fishing mortality limitations determinations, 43789
International conferences:
Pivate sector representatives on U.S. delegations, 59561
Private sector representatives on U.S. delegations; guidelines, inquiry, 37783
International Pacific halibut convention, fishery registration permits for; policy statement, 26625

Meetings:
Antarctic Marine Living Resources, 4474
Compulsory liability insurance for diplomats, 50066
Fine Arts Committee, 47339
Historical Diplomatic Documentation Advisory Committee, 47038
International Commission for Conservation of Atlantic Tunas; U.S. National Section Advisory Committee, 11777, 15510, 42055
International Educational and Cultural Affairs, U.S. Advisory Commission, 3639
International Intellectual Property Advisory Committee, 11777, 43790, 53873
International North Pacific Fisheries Commission, 41118, 41324
International Radio Consultative Committee, 3327, 3639, 6858, 7280, 7754, 8606, 8897, 11778, 12982, 14369, 14785, 18079, 32909, 36746, 41119, 48752, 58437
International Telegraph and Telephone Consultative Committee, 6857, 6858, 11778, 19745, 26173, 30954, 32205, 34235, 38478, 42055, 42831, 50529, 54314, 57994, 59565
Law of the Sea Advisory Committee, 2785, 24928, 46400
Music Advisory Committee, 6857, 10663
Ocean Affairs Advisory Committee, 5604, 11777, 24762, 45931
Overseas Schools Advisory Council, 19947, 49874
Private International Law Advisory Committee, 3786, 4153, 7279, 10999, 11884, 17560, 18807, 22474, 23668, 31253, 31254, 42830, 53873
Shipping Coordinating Committee, 2682, 3786, 7279, 10998, 12981, 12982, 14369, 15379, 15511, 15825, 16234, 17089, 18383, 18807, 19093, 19745, 20288, 23667, 26352, 26810, 27627, 27937, 29046, 32908, 32909, 35420, 35569, 36153, 36745, 37506, 39204, 42055, 43401, 43402, 45485, 49599, 49874, 51493, 52569, 53873, 55026, 56121, 57993, 61061
Transnational Enterprises Advisory Committee, 7279, 8048, 15824, 20288, 23668, 25512, 27271, 30954, 32909, 37506, 45484, 51493, 55302
World Administrative Radio Conference, 23667, 36744, 51733, 59453
Nuclear non-proliferation; establishment of procedures, 25326
Passports, foreign, validity:
Algeria et al., 48751
Privacy Act; systems of records, 16834, 26809, 33356, 37506, 40584
Privacy Act; systems of records; annual publication, 45957
Spain; postdoctoral research grants; availability, 30002
Visas, nonimmigrant, validity:
Argentina et al., 48751

## SURFACE MINING RECLAMATION AND ENFORCEMENT OFFICE

**RULES**

Abandoned mine reclamation funds, 49940
Abandoned mine reclamation funds; fee collection and coal production reporting:
Interest rate and computation, 20794, 25672
Acquisition, management and disposition of lands and water, 49944
Enforcement procedures; correction, 2722
Grants; Mining and Mineral Resources Research Institutes and mineral research projects, 38556
Grants, program development and administration and enforcement; correction, 2722
Indian reclamation program, 49951
Initial regulatory program:
Sedimentation pond; reconstruction, 2721, 8091
Mine maps, supplemental, required for small operators; inquiry and hearing, 56425
Performance standards:
General; manganese in alkaline waters, rescission, 21458
General; sediment control measures, 8091
General; sedimentation ponds and head-of-hollow fills; design criteria, etc., 52734
General; technical change, 2721, 3705
Special; correction, 2722
Surface coal mining and reclamation operations, permanent regulatory program, 49940
Underground mining; manganese in alkaline waters, rescission, 21459
Underground mining; sediment control measures, 8092
Underground mining; sedimentation ponds and head-of-hollow fills; design criteria, etc., 52734
Private land reclamation, 49947
Protection of employees; correction, 2722
Reclamation requirements, general, 49942
Recordkeeping requirements; confirmation of clearance by General Accounting Office, 5001
Rights of entry, 49943
State reclamation grants, 49949
State reclamation plans, 49947
Surface mining reclamation and enforcement; general rules and procedures; correction, 2721

**PROPOSED RULES**

Abandoned mine reclamation funds, 17918
Abandoned mine reclamation funds; fee collection and coal production reporting:
Interest rate and computation, 7305
Acquisition, management and disposition of lands and water, 17918
Grants; Mining and Mineral Resources Research Institutes and mineral research projects, 24326
Indian reclamation program, 17918
Mine maps, supplemental, required for small operators; inquiry and hearing, 56425
Performance standards:
General; alluvial valley floors technical guidelines, 38035, 46048, 50472, 50921
Surface coal mining and reclamation operations, permanent regulatory program; advance notice, 17918
Permanent regulatory program, 29012, 31954, 36114, 41662, 42282
Private land reclamation, 17918
Reclamation requirements, general, 17918
Regulatory analysis statements, 42768
Rights of entry, 17918
State reclamation grants, 17918
State reclamation plans, 17918
Surface coal mining reclamation and enforcement operations; permanent regulatory program; draft environmental statement, availability, 45886, 50407

**NOTICES**

Coal mining and reclamation plans:
Black Butte Coal Co., 43773, 52777
Energy Fuels Corp., 42822, 52550
Pittsburg & Midway Coal Mining Co., 52291
Environmental statement preparation; meeting, 31993
Meetings:
Environmental statement preparation, 31993
Indian Lands study, 31993, 36145, 38633, 39611, 42821
Mining Mineral Resources Research Advisory Committee, 29191, 30624
Mining and mineral resources research institutes; designation; inquiry, 36335
Permanent regulatory program; meetings, etc., 25881
Petitions for rulemaking:
Consolidation Coal Co. et al., 11869
Texas, State of, et al., 22459

## SUSQUEHANNA RIVER BASIN COMMISSION

**RULES**

Projects review; groundwater development standards, 34127

**PROPOSED RULES**

Freedom of information policy; inquiry, 48657
Projects review; groundwater development standards, 12724
Water resources management and development, comprehensive plan; hearing, 46980

**NOTICES**

Comprehensive plan for management and development of water resources; hearing, 4153
Meetings:
Pine Creek, Pa.; State Wild and Scenic Rivers System, 3327
Raystown Lake project, Pa.; hydropower, 1020

## TARIFF COMMISSION

*See International Trade Commission.*

## TELECOMMUNICATIONS POLICY OFFICE

**NOTICES**

Meetings:
Frequency Management Advisory Council, 8048
INMARSAT Preparatory Committee Working Group, 8048

## TENNESSEE VALLEY AUTHORITY

**RULES**

Construction approval and structure regulation; Tennessee River System; correction, 6766

**PROPOSED RULES**

Nondiscrimination; handicapped in federally-assisted programs, 18693, 23593

**NOTICES**
Environmental statements; availability, etc.:
Ocoee No. 2 Hydro Plant, Polk County, Tenn.; hearing, 40970
Floodplain management and wetlands protection; procedures, 24228
Improving Government regulations, 25951, 51733, 56743
Meetings; Sunshine Act, 1584, 3240, 3991, 5131, 7395, 9407, 15232, 17446, 19755, 21408, 21794, 49604, 50541, 51751, 52848, 53897, 55563, 56338, 56997, 58145, 59245
Privacy Act; systems of records; annual publication, 51159
Regulatory agenda, semiannual, 51733, 56743
Transmission line and substation; Cordova-Union-Browns Ferry, Tenn., Miss., and Ala., hearing, 14561
Uranium mining in New Mexico; hearing, 2682, 29636

## TEXTILE AGREEMENTS IMPLEMENTATION COMMITTEE

**NOTICES**
Bilateral textile negotiations with Brazil, Japan, and Portugal (Macau); inquiry, 57178
Bilateral textile negotiations with Colombia, Haiti, Mexico, Philippines, and Thailand; inquiry, 14533
Cotton textiles:
Brazil, 14348, 29975, 47235, 50730
China, Republic of, 13912, 18737, 23009, 26102, 27228, 27229, 28530, 39849, 51125, 57638, 58607, 59866, 60633
Colombia, 4670, 46062
Haiti, 35743, 51443
Hong Kong, 993, 23009, 29823
India, 4451, 17994, 23753, 24351, 24352, 25710, 28029, 31059, 32850, 34182, 35523, 43539, 45629, 54285
Korea, 4276, 23010, 48679, 51830
Malaysia, 36297, 58608
Mexico, 29162
Pakistan, 3738, 17027, 21346, 49830
Philippines, 17026, 29823, 42290, 43344
Poland, 11845, 14983, 47768, 50730, 52275
Romania, 13604, 16798, 50012, 51444, 58109
Singapore, 50011
Thailand, 58110
Export agreements; excess shipments, permission for entry; policy statement, 36131
Export visas and certifications for exempt textile products from Korea; authorization of new official, 4276
Man-made textiles:
China, Republic of, 13912, 18737, 23009, 26102, 27228, 27229, 28530, 33287, 39849, 43773, 47603, 51125, 57178, 58607, 59866, 60633
Colombia, 4670, 46062
Dominican Republic, 57327
Haiti, 26472, 35743, 51443
Hong Kong, 993, 23009, 29823
India, 4451, 23753, 24352, 28029, 31059, 32850, 35523, 43539, 45629
Korea, 4276, 23010, 28531, 48679, 51830, 60634
Malaysia, 36297, 58608, 60184
Mexico, 29162
Philippines, 17026, 29823, 34519, 42290, 58850
Poland, 11845, 14983
Romania, 22232, 51444, 58109
Singapore, 50011
South Africa, 60634
Thailand, 58110
Textile and apparel categories; correlation with Tariff Schedules of U.S., 884, 3421, 8828, 11592, 26773, 28850, 36297, 39408
Textile category system, shipments; exemption, 30090
Wool textiles:
China, Republic of, 13912, 18737, 23009, 26102, 27228, 27229, 28530, 39849, 51125, 58607, 60633
Colombia, 4670, 46062
Hong Kong, 993, 23009, 29823
India, 4451, 17994, 23753, 24352, 27880, 28029, 31059, 32850, 35523, 43539, 45629
Korea, 4276, 23010, 28531, 46061, 48679, 51830, 55814
Malaysia, 36297
Mexico, 29162
Philippines, 17026, 29823, 42290, 43344, 58850
Poland, 11845, 14983
Romania, 22232, 59867
Singapore, 50011

## TOBACCO PRODUCTS

*See Alcohol, Tobacco and Firearms Bureau.*

## TOXIC SUBSTANCES

*See Environmental Protection Agency.*
*Environmental Quality Council.*
*Food and Drug Administration.*
*Occupational Safety and Health Administration.*

## TRADE NEGOTIATIONS, OFFICE OF SPECIAL REPRESENTATIVE

**NOTICES**
Duties modification or continuance; articles list, 10661
Generalized System of Preferences:
Articles eligible for, 12406, 24152, 24438, 37020, 59183
Statistical information on imports (Jan. through Oct. 1977), 2782
Great Plains Wheat, Inc.; petition and hearing, 59935
Import quotas:
Stainless steel bar from Spain, 14366
Steel, specialty; shortfalls; reallocation, etc., 10453, 14366, 23038, 24921
Unalloyed unwrought copper; inquiry, 38648
Import relief investigations; determinations:
Bolts, nuts and large screws of iron or steel, 53520
Ceramic tableware, 18076, 19308
Citizen band radio transceivers; inquiry, 5448
Clothespins from Republic of China, 35765
Commercial counterfeiting; inquiry, 30633
Fishing tackle; inquiry, 46612
High carbon ferrochromium; inquiry, 40582
Pneumatic bicycle tires, 41104
Stainless steel flatware, 20583
Welded stainless steel, pipe and tube from Japan, 9545
Marketing agreements; U.S. and listed countries:
China, Republic of, 12770, 14367, 20286, 38142
Hungary, 30152
Korea, 14367, 20286, 38142
Meetings:
Trade Negotiations Advisory Committee, 10992, 12414, 24750, 24751, 43592, 56739
Multilateral trade negotiations, Tokyo Round; ad valorem duty rates conversion; inquiry, 37249, 39876, 41105
Trade Negotiations Advisory Committee, annual review; inquiry, 12770
Unfair trade practices, petitions:
Canada; U.S. television licensees, 39617, 49861
Japan; steel, 3962
Japan; thrown silk; review terminated, 8876
Union of Soviet Socialist Republics; marine insurance market, 3635, 7384, 25212

## TRANSPORTATION DEPARTMENT

*See also Coast Guard.*
*Federal Aviation Administration.*
*Federal Highway Administration.*
*Federal Railroad Administration.*
*Hazardous Materials Regulation Office.*
*Materials Transportation Bureau.*
*National Highway Traffic Safety Administration.*
*Pipeline Safety Regulation Office.*
*Research and Special Programs Administration.*
*Saint Lawrence Seaway Development Corporation.*
*Urban Mass Transportation Administration.*

**RULES**
Cargo security advisory standards; pilferable high-value or sensitive cargo transit procedures, 24693
Cargo security advisory standards; redesignated as RSPA regulation, 43305
Conduct standards:
CFR correction, 26311
Employment and financial interests statements, 54251
Organization, functions, and authority delegations:
Coast Guard Commandant; preventing collisions at sea, 5515
Coast Guard Commandant; safe containers, 17360
Federal Railroad Administrator; emergency rail services, 14021
Materials Transportation Bureau, Director, 5834
Research and Special Program Directorate; establishment, 5516
Research and Special Programs Directorate, Director; intermodal transport, 17360
Relocation assistance and land acquisition:
Moving expense allowance schedule, 10913, 33726
Time zone boundaries, standard; CFR correction, 42763

**PROPOSED RULES**
Nondiscrimination:
Handicapped in Federally-assisted programs and activities, 25016, 28216, 30316, 30585, 34171, 38881

Privacy Act; implementation, 56682
Procurement, 17974

NOTICES

Air transportation, international negotiations; proposed policy statement, 22262
Civil Rights Act of 1964; assignment of compliance functions to HEW, 38966
Committees; establishment, renewals, terminations, etc.:
Rural Transportation Advisory Task Force; membership nominations, 53874
Energy transportation study, National, 38795, 45974, 57998
Floodplain management and protection, procedures; inquiry, 27148
Improving Government regulations, 9582, 23884, 23918, 23925
Meetings:
Energy transportation study, National, 49391, 49392, 49515, 57998
Minority business enterprise program, 20883
Organization and functions:
Surface Transportation Administration; proposed establishment; inquiry, 52569
Privacy Act; systems of records, 4305, 17090, 57995
Privacy Act; systems of records; annual publication, 38508
Regulatory agenda, semi-annual, 42914
Waterfront liquified natural gas facilities; memorandum of understanding between Coast Guard and Materials Transportation Bureau, 30381
Wetlands preservation; policy and procedures, 45285

## TRANSPORTATION POLICY STUDY, NATIONAL COMMISSION

NOTICES

Hearings, 5447, 17089
Meetings, 14777, 21955, 25212, 30002, 56736, 58434
Past accomplishment and future plans; annual review, 5907

## TRAVEL SERVICE

NOTICES

Improving Government regulations; inquiry, 23195
International travel promotional projects; availability of matching funds, 26344
Meetings:
Airline Seminar, 53492
Travel Advisory Board, 3149, 4670, 12903, 17388, 34830, 39849, 49556, 55436

## TREASURY DEPARTMENT

*See also Alcohol, Tobacco and Firearms Bureau.*
*Comptroller of Currency.*
*Customs Service.*
*Engraving and Printing Bureau.*
*Fiscal Service.*
*Foreign Assets Control Office.*
*Internal Revenue Service.*
*Public Debt Bureau.*
*Revenue Sharing Office.*
*Secret Service.*

RULES

Antidumping:
Carbon steel plates from Japan, 22937
Coin regulations; CFR Part revoked, 24691
Conduct standards:
Teaching, writing, lecturing, etc.; honoraria or reimbursement for expenses, 17471
Currency and foreign transactions; financial recordkeeping and reporting:
Identification required, 21672
Interpretations and exemptions, 27826
Maintaining additional records, 24527
Foreign exchange; reporting requirements, international capital forms; revision, 50175
National security information; classification, downgrading, declassification and safeguarding, 60448
Portfolio investment surveys, 51629
Records disclosure; locations of IRS offices, 42249

PROPOSED RULES

Currency and foreign transactions; financial recordkeeping and reporting; identification required, 10940
Nondiscrimination:
Handicapped in Federally-assisted programs and activities, 25016
Portfolio investment surveys, 25636
Practice before Internal Revenue Service:
Actuaries, 34161
Advertising and solicitation, 25695, 29969, 38045

NOTICES

Antidumping:
Audible signal alarms from Japan, 21962, 30956
Automotive and motorcycle repair manuals from United Kingdom, 35139, 45932
Bicycle tires and tubes from Korea, 7496, 41449, 61067
Bicycle tires and tubes from Republic of China, 7496, 41451, 61066
Carbon steel bars, strip, plates, and structural shapes from United Kingdom, 32343, 47041
Carbon steel bars from United Kingdom, 3231
Carbon steel plate from Japan, 2032, 12780
Carbon steel plate from Spain, 54315
Carbon steel plates from Poland, 49875
Carbon steel plates from Republic of China, 49875
Carbon steel plates from Spain, 49875
Carbon steel plates from United Kingdom, 3232
Carbon steel sheets, plates, pipes and tubes, and structural products from Japan; terminated, 9212
Carbon steel sheets from Belgium, 24933
Carbon steel sheets from France, 24933
Carbon steel sheets from Italy, 24933
Carbon steel sheets from Netherlands, 24933
Carbon steel sheets from United Kingdom, 24933
Carbon steel sheets from West Germany, 24933
Carbon steel strip from United Kingdom, 3231
Carbon steel wire rods from France, 19947
Carbon steel wire rods from France and United Kingdom, 30956
Clear sheet glass from West Germany, 30635
Cold rolled and galvanized carbon steel from Belgium, 37052
Cold rolled and galvanized carbon steel from France, 37052
Cold rolled and galvanized carbon steel from Germany, 37052
Cold rolled and galvanized carbon steel from Italy, 37052
Cold rolled and galvanized carbon steel from Netherlands, 37052
Cold rolled and galvanized carbon steel from United Kingdom, 37052
Condenser paper from Finland, 35137
Condenser paper from France, 35138
Cumene from Italy, 7497, 39206, 57369
Cumene from Netherlands, 7497, 39205, 57370
Ice hockey sticks from Finland, 9912
Light bulbs from Hungary, 34861, 52087
Marine radar systems from United Kingdom, 51724
Methyl alcohol from Canada, 25758, 59196
Motorcycles from Japan, 2968, 17900, 35140, 48754
Nylon yarn from France, 3470, 31257
Nylon yarn from Japan, 9913, 22480
Offset paper from Canada, 7079, 26353
Perchlorethylene from Belgium, 32009
Perchlorethylene from France, 32010
Perchlorethylene from Italy, 32011
Photographic color paper from Japan, 15380, 27272
Photographic color paper from West Germany, 15381, 27271
Pneumatic marine fenders from Japan, 29046, 44952
Polyvinyl chloride sheet and film from Republic of China, 2254
Portland gray cement from Portugal, pig iron from U.S.S.R., etc. tentative revocation, 45497
Portland hydraulic cement from Canada, 11294, 28066
Roller chain, other than bicycle, from Japan, 30635
Silicon metal from Canada, 38659, 57371
Sorbates from Japan, 8681, 26175
Stainless steel round wire from Japan, 32914
Steel wire nails from Canada, 29654, 51743
Steel wire rope from Korea, 19095, 24934, 36155, 55306
Steel wire strand for prestressed concrete from India, 23672
Steel wire strand for prestressed concrete from Japan, 23671, 38495
Structural carbon steel shapes from United Kingdom, 3233
Sugar from Belgium, 36746
Sugar from France, 36746
Sugar from Germany, 36746
Titanium dioxide from Belgium, 50781
Titanium dioxide from Federal Republic of Germany, 50781
Titanium dioxide from France, 50781
Titanium dioxide from United Kingdom, 50781
Vicose rayon staple fiber from Belgium, 3233
Viscose rayon staple fiber from Austria, 3234, 9403, 40095, 57999
Viscose rayon staple fiber from Belgium, 18619, 32915
Viscose rayon staple fiber from Finland, 19490, 53532
Viscose rayon staple fiber from France, 19489, 53531

Viscose rayon staple fiber from Italy, 19491, 53533
Viscose rayon staple fiber from Sweden, 19492, 53534
Welded stainless steel pipe and tubing from Japan, 2031, 17439
Winter vegetables from Mexico, 48753
Authority delegations:
Alcohol, Tobacco, and Firearms Bureau, Director; trafficking in contraband cigarettes, 58244
Assistant Secretary (Enforcement and Operations); order of succession, 25215
Assistant Secretary (Tax Policy); order of succession, 3327
Auditing, Assistant Comptroller, surety authority certificates, 39205
Deputy Assistant Secretary (Operations); petitions, 16237
General Counsel; approval of IRS laws, 5450
Mayor, District of Columbia, loan authority, 54156
Secret Service, Director, 24762
Bonds, Treasury:
1993 series, 56, 26815, 29205, 43404, 45933
1995-2000 series, 18622
2000-2005 series, 3982
2003-2008 series, 33362, 35420, 50532, 52322
Boycotts, international:
Guidelines; question and answers; Tax Reform Act provisions, 3454
List of countries requiring cooperation, 56, 13937, 28884, 45667
Committees; establishment, renewals, terminations, etc.:
International Monetary System Advisory Committee, 35571
Small Business Advisory Committee, 16588
Contract construction; guideline depreciation periods and assets repair allowance percentages; study availability, 2968
Countervailing duties; bases review:
Non-rubber footwear, olives and zinc from Spain, 38658
Currency and foreign transactions; financial recordkeeping and reporting, 12983, 33861, 49874
Deposit interest rate controls and housing credit; inquiry, 4894
Floodplain management and wetlands protection; memorandum, 22311
Gold sales directive, 17900
Improving Government regulations, 22319, 52120
Iron and steel lag screws and bolts, etc.; effects of imports on National security; report availability, 57745
Meetings:
Debt Management Advisory Committee, 12983, 29877, 45497, 47042, 60364
International Monetary System Advisory Committee, 34861
International Monetary System Reform Advisory Committee, 11295
Small Business Advisory Committee, 8899, 22122, 45668, 56305
Tax Court Nominating Commission, U.S., 46917, 49085
Notes, Treasury:
A-1985 series, 3981
A-1988 series, 18620, 19948
B-1985 series, 33360, 35140
B-1988 series, 50534, 52088
C-1980 series, 12984
C-1983 series, 12779, 13937
G-1982 series, 7283, 8323
H-1982 series, 22797, 24642
J-1982 series, 38498, 39467
K-1980 series, 2470, 3327
K-1982 series, 50535, 51745
L-1980 series, 6667, 7497
L-1982 series, 58880, 60692
M-1980 series, 11781, 12984
M-1981 series, 3979, 4894
N-1980 series, 16237, 17902
N-1981 series, 33358, 34862
P-1980 series, 21963, 23669
Q-1980 series, 26353, 27632
R-1980 series, 30958, 32344
S-1980 series, 37299, 38659
T-1980 series, 42055, 43792
U-1980 series, 49392, 50532
V-1980 series, 54156, 55513
W-1980, 58870, 60247
Organization and functions:
Inspector General; establishment of position, 32916
Inspector General; foreign intelligence activities oversight, 32915
Internal Revenue Service; transfer of functions within, 12984
Legal Division, 25214, 47343, 49600
Secretary; order of succession, 11884
Privacy Act; systems of records, 35571, 45498
Privacy Act; systems of records; annual publication, 42510
Securities Exchange Act; designation of exemption securities, 24933
Security import investigations:
Nuts, bolts and screws, 8322
Steel mill products; imported:
Great Lakes freight rates, adjustment under steel trigger price system, 32730
Great Lakes region trigger prices; handling charges adjustment and hearing, 23669
Treasury Steel Trigger Price Task Force, upward revision of average costs, 32710
Trigger base prices and extras, new and adjusted, 32715, 54717
Trigger price mechanism and extras, 1464, 4703, 8657, 9912, 12783, 18383, 20070, 22122, 33993, 38155
Trigger Price Mechanism Manual; availability, 47809
Trigger prices, first quarter, 54710
Trigger prices, fourth Quarter, 32713
Tax treaties, estate and gift; various countries:
Morocco et al., 52088
Tax treaties, income; various countries:
Bangladesh; inquiry, 32914
Canada; meeting, 49600
Denmark; meeting, 47042
Germany; meeting, 59578
Italy; meeting, 26816
Jamaica; meeting, 32913
Morocco et al., 52088

## TRUMAN, HARRY S., SCHOLARSHIP FOUNDATION

**RULES**
Scholarship program, 26366

**NOTICES**
Meetings; Sunshine Act, 2687, 13658, 39637
Privacy Act; systems of records; annual publication, 51142
Scholarship program; closing date for nominations, 52061

## UNEMPLOYMENT

*See Economic Development Administration.*
*Employment and Training Administration.*
*Labor Department.*
*Manpower Administration.*
*Railroad Retirement Board.*

## UNEMPLOYMENT COMPENSATION, NATIONAL COMMISSION

**NOTICES**
Meetings, 8867, 15372, 19483, 25884, 25885, 34846, 40940, 41312, 41313, 47332, 51882, 58125
Unemployment compensation programs assessment; hearings, 18073

## UNITED STATES INFORMATION AGENCY

**NOTICES**
Meetings:
Information Advisory Commission, 11003

## UNITED STATES RAILWAY ASSOCIATION

**NOTICES**
Loan applications:
Consolidated Rail Corp., 3235, 39627
Meetings; Sunshine Act, 1884, 5132, 9407, 12182, 14599, 15406, 16259, 21409, 26881, 32370, 39216, 42102, 44967, 50124, 50986, 53103, 55838, 56339, 58473, 60717

## UNIVERSAL SOCIAL SECURITY COVERAGE STUDY

**NOTICES**
Hearings, 54698

## URBAN AFFAIRS

*See Community Planning and Development, Office of Assistant Secretary.*
*Community Services Administration.*
*Economic Development Administration.*
*Urban Mass Transportation Administration.*

## URBAN MASS TRANSPORTATION ADMINISTRATION

**RULES**
Accounts, uniform system, and records and reporting system:
Urbanized areas; reporting requirements, 48928
Buy America requirements, 57145
Elderly and handicapped persons transportation; buses with ramps or lifts, 41989
Public transportation:
Nonurbanized areas; Federal financial assistance, 58308

**PROPOSED RULES**
Urban transportation investment policy and procedures, 57478

NOTICES
Air quality planning grants, urban; availability and inquiry, 60215
Apportionment formulas; urbanized areas, 58935
Rail transit equipment procurement contracts, guidelines; availability, 8321
Rail transit facilities, policy statement, 9428
Transbus procurement requirements; elderly and handicapped transportation services; inquiry, 11779, 15026

## URBAN REINVESTMENT TASK FORCE

NOTICES
Neighborhood preservation projects; application procedures, 18388

## VESSELS

*See Coast Guard.*
*Customs Service.*
*Engineers Corps.*
*Federal Maritime Commission.*
*Interstate Commerce Commission.*
*Maritime Administration.*
*Panama Canal.*
*Saint Lawrence Seaway Development Corporation.*

## VETERANS ADMINISTRATION

RULES
Adjudication; pensions, compensation, dependency, etc.:
Automobile allowance, payment, 4423
Czechoslavakia and Poland, former members of armed forces; eligibility, 4424
Disabilities rating schedule, 45348
Discharge, character of, 15153
Housing, specially adapted; disability compensation, 14017
Incompetency and competency determinations; effective dates establishment, 11703
Ratings for special purposes; disability or death resulting from VA hospitalization or medical or surgical care, 51015
Tuberculosis; rating considerations, 45347
Authority delegations:
Education and Rehabilitation Service, Director; conflicts of interest, 3707
General Counsel et al.; medical care claims, 10560
General Counsel et al.; subpoena authority, 39365
Memorial Affairs Department, Director, 22973
Legal services, General Counsel:
Claimants representation; recognition of organizations, attorneys, and agents, 46535
Medical care claims, 10560
Penal statutes violation, procedure, 39365
Tort claims, Federal, 2722
Loan guaranty:
Conventionally built homes; loan guaranty entitlement increase, etc., 60459
Home improvement loans, appraisals and lien requirements, 51016
Home loans in foreclosure, 53728
Interest, payment to investors, 45400
Interest rate increase, 9274, 22717, 29001
Mobile home, double-wide; definition, 37197
Medical benefits; Czechoslovakian and Polish veterans, 57144
National Cemetery System; operation, 26571
Procurement, 6091, 8258, 22032, 24532, 45363, 51634
Vocational rehabilitation and education:
Collegiate undergraduate; credit-hour basis, 49982
Conflicts of interest, 3707
Educational assistance benefits; medical-dental courses, 25429
Educational assistance benefits; monthly rate increases, etc., 35280
Overpayments; charges against entitlement, 52486
Overpayments; waiver or recovery, 45399
Refunds by schools, prompt, 3909

PROPOSED RULES
Adjudication; pensions, compensation, dependency, etc.:
Discharge, character of; benefits eligibility, 2737
Effective dates, 40239
Rate increase, 55420
Ratings for special purposes; disability or death resulting from VA hospitalization or medical or surgical care, 34505
Tuberculosis; rating considerations, 28824
Women's Air Force Service Pilots; eligibility, 5856
Authority delegations:
Director, Education and Rehabilitation Service; school closing, 54104
General Counsel et al.; subpoena authority, 12892
National Cemetery System, Director, 1631
Disabilities rating schedule, 28826
Legal services, General Counsel:
Claimants representation; recognition of organizations, attorneys and agents, 17482
Penal statutes violation, procedure, 12893
Loan guaranty:
Appraisals and lien requirements, 39150
Home loans in foreclosure, 10583
Mobile home, double-wide; definition, 17840
Mobile home; liability release provisions and setup charges increase, 39833
Medical benefits; Czechoslovakian and Polish veterans, 38046
National Cemetery System; operation, 1628
Nondiscrimination:
Handicapped in federally-assisted programs, 19166, 25146
Personal information safeguards, 57923
Procurement, 14525
School liability cases; determination policy and procedures; inquiry, 2635
Vocational rehabilitation and education:
Buying back of entitlements; educational assistance, 54666
Collegiate undergraduate; credit-hour basis, 37204
Counseling; policy and procedures, 22059
Course measurement and 2-year operation period waivers, 10581
Education loan program, 38046
Educational assistance benefits; medical-dental courses, 9322
Educational assistance benefits; monthly rate increases, etc., 6722
Overpayments; charges against entitlement, 39832
Policy and procedures; inquiry, 5549, 6969
Progress, student; determining unsatisfactory, 10706
School closing, authority delegation to Education and Rehabilitation Service, 54104
Unsatisfactory progress provisions, 15336

NOTICES
Advisory committee review; inquiry, 7390
Armed Forces discharge review/correction boards index; agreement between Department of Defense and Veterans Administration, 50956
Chaplain and Canteen Services, reports; availability, 48755
Committees; establishment, renewals, terminations, etc.:
Career Development Committee, 19095
Health Services Research and Development Merit Review Board, 36747
Medical Research Service Merit Review Boards, 2683
Rehabilitative Engineering Research and Development Merit Review Board, 36747
Education benefits; policies and procedures, 2035
Environmental statements; availability, etc.:
Bay Pines Veterans Administration Center, 7284, 31079
Bourne, Mass., National Cemetery; excessed Otis AFB land, 43596
California National Cemetery, 20886
Indiantown Gap National Cemetery, Annville, Pa., 59197
Veterans Administration Hospital, Richmond, Va., 40097
Veterans Administration Medical Center (VAMC), Sepulveda, Calif.; electrical deficiencies project, 57372
Floodplain and wetlands management, guidelines, 37406
Improving Government regulations, 21983, 45499, 58881
Meetings:
Administrator's Education and Rehabilitation Advisory Committee, 7284, 40332
Career Development Committee, 43595
Central Office Education and Training Review Panel, 8899, 19096, 22142, 23070, 24642, 26178, 36026, 47633, 57209
Cooperative Studies Evaluation Committee, 6669, 23070, 43595
Educational Allowances Station Committee, 2472, 4478, 4479, 5912, 8610, 13937, 14369, 23673, 25215, 25216, 25895, 31258, 36549, 38660, 39626, 41128, 47043, 50531, 52088, 52322, 54157, 56971, 58853
Health Manpower Grants Review Committee, 36026
Health Services Research and Development Merit Review Board, 55307
Medical Research Service Merit Review Boards, 5467, 39625
Special Medical Advisory Group, 11296, 42836
Structural Safety of Veterans Administration Facilities, 8899, 38500
Voluntary Service National Advisory Committee, 43405
Wage Committee, 10664, 24934, 40584, 58438
Privacy Act; systems of records, 3984, 12143, 15026, 23797, 25216, 45498

Privacy Act; systems of records; annual publication, 44739
Regulatory agenda; semiannual, 58881
Wage Committee annual report; availability, 12984
Wheelchair lift systems (automatic) for passenger motor vehicles; design criteria for safety and quality, 21390

## VOCATIONAL REHABILITATION AND EDUCATION

*See Education Office.*
*Veterans Administration.*

## WAGE AND HOUR DIVISION

**RULES**

American Samoa; wage orders; certain industries, 25816, 26003
Apprentices, employment of:
On-the-job work experience; hours requirement, 12311
Child labor for agricultural employment, 26565, 27469, 28471, 36623, 37180
Garnishment of earnings; restrictions, 28471, 30276
Handicapped clients in sheltered workshops, employment:
Work activities center qualifications; monetary test increases, 5818
Homeworkers in certain industries, employment; technical changes, 28470
Learners, employment of:
Wage rate increases, subminimum; certain industries, 5816
Students, full-time; employment at subminimum wages, 29000

**PROPOSED RULES**

Age discrimination in employment:
Employee benefit plans; interpretation and hearing, 43264
Executive and high policymaking employees in the private sector; exemption, 58148
Tenured employees at institutes of higher education; exemption, 58154
Child labor for agricultural employment; hearing, 14068, 18570, 18709
Equal Pay Act; employee benefits, 38029
Executive, administrative, and professional employees:
Salary test levels for exemption; increase determination; hearing, 14688

**NOTICES**

American Samoa; industry committee; appointment, convention, hearing, 2461
Fire protection and law enforcement employees of public agencies; average numbers of hours worked, study; overtime compensation rate, 3779
Learners, certificates authorizing employment at special minimum wages, 4697, 19481, 30373, 46608
Performers, professional, employed on projects or productions funded by Arts National Endowment; exemption application; Ballet West, 2460
Puerto Rico and Virgin Islands; various industry committees; cancellation of hearings, 7745

## WAGE AND PRICE STABILITY COUNCIL

**RULES**

Wage and price guidance; anti-inflation program, 60773

**PROPOSED RULES**

Wage and price guidance; anti-inflation program, 51938

**NOTICES**

Building materials, hearing, 39850

## WATER AND WATERWAYS

*See Canada and United States-International Joint Commission.*
*Coast Guard.*
*Delaware River Basin Commission.*
*Engineers Corps.*
*Environmental Protection Agency.*
*Federal Maritime Commission.*
*Interior Department.*
*Interstate Commerce Commission.*
*Panama Canal.*
*Saint Lawrence Seaway Development Corporation.*
*Soil Conservation Service.*
*Water Resources Council.*

## WATER RESOURCES COUNCIL

**RULES**

Organization and functions, 25944

**PROPOSED RULES**

Nondiscrimination:
Handicapped in federally-assisted programs, 54260

**NOTICES**

Coal gasification demonstration project, Georgetown, Ky.; water assessment report, 29758
Floodplain management, guidelines, 6030, 11885
Improving Government regulations; inquiry, 23199, 24212
Meetings:
Council of Members, 32206
Planning water and related land resources:
Bumping lake enlargement project exemption, 32206
Discount rate change, 50276, 50537
Privacy Act; systems of records; annual publication, 57470
Regional water resource management plans, policy statement, 28884

## WESTERN AREA POWER ADMINISTRATION

**NOTICES**

Environmental statements; availability, etc.:
Miles City-Baker-Hettinger-New Underwood 230kV transmission line, Montana-North Dakota-South Dakota, 50500
Meetings:
Marketing power from Navaho Project, 40909
Peaking power allocation; general marketing criteria:
Colorado River Storage Project, 5559, 26793
Power rate adjustments:
Central Valley Project, Calif., 16391, 43065, 54132

## WHITE HOUSE CONFERENCE ON BALANCED NATIONAL GROWTH AND ECONOMIC DEVELOPMENT

*See Balanced National Growth and Economic Development, White House Conference.*

## WHITE HOUSE CONFERENCE ON LIBRARY AND INFORMATION SERVICES

*See Library and Information Services, White House Conference.*

## WHITE HOUSE FELLOWSHIPS, PRESIDENT'S COMMISSION

**NOTICES**

Meetings, 7749

## WOMEN, NATIONAL ADVISORY COMMITTEE

**NOTICES**

Meetings, 41312, 52065, 52564, 60675

## WORKPLACE SAFETY AND HEALTH INTERAGENCY TASK FORCE

**NOTICES**

Governmental regulatory programs; inquiry, 7929
Making Prevention Pay, recommendations; inquiry, 59909

## WORLD HUNGER, PRESIDENTIAL COMMISSION ON

**PROPOSED RULES**

Privacy Act; implementation, 55770

**NOTICES**

Meetings, 50066, 53521, 56966
Privacy Act; systems of records, 56344

# PRIVACY ACT PUBLICATIONS—ANNUAL, 1978


## ACTION

NOTICES
Systems of records, 3732, 10421, 13406, 37476, 56924
Systems of records; annual publication, 39928

## AGENCY FOR INTERNATIONAL DEVELOPMENT

NOTICES
Systems of records; annual publication, 43632

## AGRICULTURE DEPARTMENT

NOTICES
Systems of records, 4080, 7137, 22227, 28019, 28020, 35085, 60628
Systems of records; annual publication, 51268

## AIR FORCE DEPARTMENT

RULES
Implementation, 19230

PROPOSED RULES
Implementation, 6813

NOTICES
Systems of records, 16894, 25170, 46063, 50286

## ALCOHOL, TOBACCO AND FIREARMS BUREAU

NOTICES
Systems of records, 14713

## ARMS CONTROL AND DISARMAMENT AGENCY

PROPOSED RULES
Implementation, 17003, 26589

NOTICES
Systems of records, 17020, 26602, 50953

## ARMY DEPARTMENT

RULES
Implementation, 1336, 17821, 38823

PROPOSED RULES
Implementation, 27864, 59852

NOTICES
Systems of records, 3151, 15353, 26606, 27882, 30594, 34520, 38070, 40272, 42026, 43059, 47604, 48894, 49557, 52512, 58111, 59116, 59539, 59869

## BLIND AND OTHER SEVERELY HANDICAPPED, COMMITTEE FOR PURCHASE FROM

NOTICES
Systems of records; annual publication, 43639

## CENTRAL INTELLIGENCE AGENCY

NOTICES
Systems of records; annual publication, 45956

## CHILD, INTERNATIONAL YEAR OF THE, 1979, NATIONAL COMMISSION

RULES
Implementation, 30035

PROPOSED RULES
Implementation, 23583

NOTICES
Systems of records, 23660, 30145

## CIVIL SERVICE COMMISSION

RULES
Implementation, 46505

PROPOSED RULES
Implementation, 35721

NOTICES
Systems of records, 13597, 26471, 31426, 35739, 46561, 47767, 49770, 60983
Systems of records; annual publication, 40106

## COMMERCE DEPARTMENT

RULES
Implementation, 43020

NOTICES
Systems of records, 4083, 25853, 28028, 32445, 36672
Systems of records; annual publication, 43112

## COMMUNITY SERVICES ADMINISTRATION

NOTICES
Systems of records; annual publication, 42116

## COPYRIGHT OFFICE, LIBRARY OF CONGRESS

RULES
Implementation, 776

NOTICES
Systems of records, 5113
Systems of records; annual publication, 41165

## COPYRIGHT ROYALTY TRIBUNAL

PROPOSED RULES
Implementation, 49318

## DEFENSE CIVIL PREPAREDNESS AGENCY

NOTICES
Systems of records, 30331

## DEFENSE COMMUNICATIONS AGENCY

NOTICES
Systems of records, 16365

## DEFENSE CONTRACT AUDIT AGENCY

NOTICES
Systems of records, 13605

## DEFENSE DEPARTMENT

NOTICES
Systems of records, 1524, 2653, 2751, 8002, 13090, 13421, 19906, 26473, 29600, 30330, 33876, 34936, 34979, 34982, 34984, 43539, 56703, 58405, 60331
Systems of records; annual publication, 42374

## DEFENSE INTELLIGENCE AGENCY

RULES
Implementation, 3275, 31130

PROPOSED RULES
Implementation, 24711

NOTICES
Systems of records, 24352

## DEFENSE INVESTIGATIVE SERVICE

RULES
Implementation, 25672, 26720

PROPOSED RULES
Implementation, 19689

NOTICES
Systems of records, 19701

## DEFENSE LOGISTICS AGENCY

NOTICES
Systems of records, 2751, 40902

## DEFENSE MAPPING AGENCY

NOTICES
Systems of records, 58404

## DEFENSE NUCLEAR AGENCY

NOTICES
Systems of records, 6829, 16366

## DISEASE CONTROL CENTER

NOTICES
Systems of records, 41088

## EDUCATION OFFICE

NOTICES
Systems of records, 15785

## ELECTRONIC FUND TRANSFERS, NATIONAL COMMISSION

**NOTICES**
Systems of records; transferred to GSA, 801

## ENERGY DEPARTMENT

**NOTICES**
Systems of records, 6306, 18739, 32855, 39171

## ENVIRONMENTAL PROTECTION AGENCY

**NOTICES**
Systems of records, 3502, 40057

## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

**NOTICES**
Systems of records, 30347
Systems of records; annual publication, 19634, 39930

## EXPORT-IMPORT BANK

**RULES**
Implementation, 57864

## FEDERAL COMMUNICATIONS COMMISSION

**NOTICES**
Systems of records, 18019
Systems of records; annual publication, 43633

## FEDERAL DEPOSIT INSURANCE CORPORATION

**NOTICES**
Systems of records; annual publication, 37152

## FEDERAL ELECTION COMMISSION

**NOTICES**
Systems of records, 32328

## FEDERAL HOME LOAN BANK BOARD

**NOTICES**
Systems of records; annual publication, 35792

## FEDERAL HOME LOAN MORTGAGE CORPORATION

**NOTICES**
Systems of records; annual publication, 56342

## FEDERAL LABOR RELATIONS COUNCIL

**NOTICES**
Sytems of records; annual publication, 39937

## FEDERAL MEDIATION AND CONCILIATION SERVICE

**NOTICES**
Systems of records; annual publication, 38512

## FEDERAL PAPERWORK COMMISSION

**NOTICES**
Systems of records; tranfer to GSA, 2424

## FEDERAL REGISTER OFFICE

**NOTICES**
Publication requirements, 1978; alternative plan, 23749

## FEDERAL RESERVE SYSTEM

**NOTICES**
Systems of records; annual publication, 41164

## FEDERAL SERVICE IMPASSES PANEL

**NOTICES**
Systems of records; annual publication, 39937

## FEDERAL TRADE COMMISSION

**NOTICES**
Systems of records, 50969, 59550
Systems of records; annual publication, 40110, 44886

## FOREST SERVICE

**NOTICES**
Systems of records, 32843

## GENERAL SERVICES ADMINISTRATION

**PROPOSED RULES**
Implementation, 43049

**NOTICES**
Systems of records, 22242, 38623, 43066, 53497, 56733
Systems of records; annual publication, 39938

## HEALTH, EDUCATION, AND WELFARE DEPARTMENT

**RULES**
Implementation, 40229

**NOTICES**
Systems of records, 1135, 2668, 3175, 9354, 9355, 15786, 19079, 28253, 42307, 49770, 51847, 58637, 61008
Systems of records; annual publication, 44102

## HEALTH CARE FINANCING ADMINISTRATION

**NOTICES**
Systems of records, 10979, 12088, 22446, 22448, 22449, 52524

## HOUSING AND URBAN DEVELOPMENT DEPARTMENT

**NOTICES**
Systems of records, 12760, 12761, 15367, 21947, 22245, 25386, 27247, 27248, 36698, 38473, 51848, 56942
Systems of records; annual publication, 55102

## INDIAN CLAIMS COMMISSION

**NOTICES**
Systems of records, 46384

## INDUSTRY AND TRADE ADMINISTRATION

**NOTICES**
Systems of records, 15800

## INTERIOR DEPARTMENT

**NOTICES**
Systems of records, 10640, 13640, 24748, 35557, 37496, 49579
Systems of records; annual publication, 49480

## INTERNATIONAL COMMUNICATION AGENCY

**RULES**
Implementation, 14457

## INTERNATIONAL TRADE COMMISSION

**NOTICES**
Systems of records, 34218
Systems of records, annual publication, 50802

## INTERSTATE COMMERCE COMMISSION

**NOTICES**
Systems of records; annual publication, 50804

## JUSTICE DEPARTMENT

**RULES**
Implementation, 19883, 36439, 38386, 45993, 49535

**PROPOSED RULES**
Implementation, 19883, 21901, 22999, 35347, 36486, 43330, 51816

**NOTICES**
Systems of records, 7060, 18059, 18060, 19926, 21953, 25883, 30138, 31443, 33350, 33351, 35403, 36149, 36520, 38120, 38474, 51861, 53067, 56287, 57357, 57990
Systems of records; annual publication, 44676

## LABOR DEPARTMENT

**RULES**
Implementation, 36070

**PROPOSED RULES**
Implementation, 25145

**NOTICES**
Systems of records, 25206, 28579, 29042
Systems of records; annual publication, 42106

## LIBRARIES AND INFORMATION SCIENCE, NATIONAL COMMISSION

**RULES**
Implementation, 47195

**PROPOSED RULES**
Implementation, 34805

**NOTICES**
Systems of records, 47332
Systems of records; annual publication, 35805

## MANAGEMENT AND BUDGET OFFICE

NOTICES
Guidance for matching programs; inquiry, 34724
Systems of records, 2466, 9907, 11292, 14556, 15377, 20064, 22468, 25751, 26624, 27620, 33972, 39615, 41320, 44579, 52071, 56738

## MARINE MAMMAL COMMISSION

NOTICES
Systems of records; annual publication, 36524

## MEXICO AND UNITED STATES, INTERNATIONAL BOUNDARY AND WATER COMMISSION

RULES
Implementation, 47182

NOTICES
Systems of records; annual publication, 45959

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

NOTICES
Systems of records; annual publication, 38515

## NATIONAL CREDIT UNION ADMINISTRATION

RULES
Implementation, 5360

## NATIONAL LABOR RELATIONS BOARD

NOTICES
Systems of records, 38646
Systems of records; annual publication, 43640

## NATIONAL SCIENCE FOUNDATION

NOTICES
Systems of records, 10651, 16556, 25502, 40082, 46609
Systems of records; annual publications, 53624

## NATIONAL TRANSPORTATION SAFETY BOARD

NOTICES
Systems of records; annual publication, 39941

## NAVAJO AND HOPI INDIAN RELOCATION COMMISSION

NOTICES
Systems of records; annual publication, 59556

## NAVY DEPARTMENT

NOTICES
Systems of records, 5472, 16367, 28532, 54124

## NEIGHBORHOODS NATIONAL COMMISSION

RULES
Implementation, 28198

PROPOSED RULES
Implementation, 20511

NOTICES
Systems of records, 20568

## NUCLEAR REGULATORY COMMISSION

NOTICES
Systems of records, 29635, 52305
Systems of records; annual publication, 35806

## PANAMA CANAL

RULES
Implementation, 11577

PROPOSED RULES
Implementation, 58394

NOTICES
Systems of records; annual publication, 43641

## PENNSYLVANIA AVENUE DEVELOPMENT CORPORATION

NOTICES
Systems of records; annual publication, 39942

## PENSION BENEFIT GUARANTY CORPORATION

NOTICES
Systems of records, 23772, 34225
Systems of records; annual publication, 39943

## POSTAL SERVICE

RULES
Implementation, 41391

NOTICES
Systems of records, 6849, 16229, 25893, 32478, 32479
Systems of records; annual publication, 40122

## RAILROAD RETIREMENT BOARD

RULES
Implementation, 17468

NOTICES
Systems of records, 27267
Systems of records; annual publication, 43642

## SECURITIES AND EXCHANGE COMMISSION

NOTICES
Systems of records, 21769, 21771, 36536, 36538, 56119

## SMALL BUSINESS ADMINISTRATION

NOTICES
Systems of records, 8605, 19744
Systems of records; annual publication, 45969

## SOIL CONSERVATION SERVICE

RULES
Implementation, 34756

## STATE DEPARTMENT

PROPOSED RULES
Implementation, 46046

NOTICES
Systems of records, 16834, 26809, 33356, 37506, 40584
Systems of records; annual publication, 45957

## TENNESSEE VALLEY AUTHORITY

NOTICES
Systems of records; annual publication, 51159

## TRANSPORTATION DEPARTMENT

PROPOSED RULES
Implementation, 56682

NOTICES
Systems of records, 4305, 17090, 57995
Systems of records; annual publication, 38508

## TREASURY DEPARTMENT

NOTICES
Systems of records, 35571, 45498
Systems of records; annual publication, 42510

## TRUMAN, HARRY S., SCHOLARSHIP FOUNDATION

NOTICES
Systems of records; annual publication, 51142

## VETERANS ADMINISTRATION

NOTICES
Systems of records, 3984, 12143, 15026, 23797, 25216, 45498
Systems of records; annual publication, 44739

## WATER RESOURCES COUNCIL

NOTICES
Systems of records; annual publication, 57470

## WORLD HUNGER, PRESIDENTIAL COMMISSION ON

PROPOSED RULES
Implementation, 55770

NOTICES
Systems of records, 56344

# FEDERAL REGISTER PAGES AND DATES—1978

| Pages | Date |
|---|---|
| 1-751 | Jan. 3 |
| 753-947 | 4 |
| 949-1057 | 5 |
| 1059-1287 | 6 |
| 1289-1469 | 9 |
| 1471-1610 | 10 |
| 1611-1783 | 11 |
| 1785-1913 | 12 |
| 1915-2166 | 13 |
| 2167-2373 | 16 |
| 2375-2625 | 17 |
| 2627-2717 | 18 |
| 2719-2814 | 19 |
| 2815-3069 | 20 |
| 3071-3250 | 23 |
| 3251-3347 | 24 |
| 3349-3542 | 25 |
| 3543-3692 | 26 |
| 3693-3895 | 27 |
| 3897-3991 | 30 |
| 3993-4244 | 31 |
| 4245-4412 | Feb. 1 |
| 4413-4582 | 2 |
| 4583-4844 | 3 |
| 4845-4955 | 6 |
| 4957-5353 | 7 |
| 5355-5494 | 8 |
| 5495-5791 | 9 |
| 5793-6055 | 10 |
| 6057-6201 | 13 |
| 6203-6573 | 14 |
| 6575-6757 | 15 |
| 6759-6912 | 16 |
| 6913-7198 | 17 |
| 7199-7305 | 21 |
| 7307-7419 | 22 |
| 7421-7608 | 23 |
| 7609-7966 | 24 |
| 7967-8094 | 27 |
| 8095-8246 | 28 |
| 8247-8504 | Mar. 1 |
| 8505-8776 | 2 |
| 8777-9131 | 3 |
| 9133-9267 | 6 |
| 9269-9454 | 7 |
| 9455-9584 | 8 |
| 9585-9772 | 9 |
| 9773-10327 | 10 |
| 10329-10533 | 13 |
| 10535-10681 | 14 |
| 10683-10899 | 15 |
| 10901-11140 | 16 |
| 11141-11555 | 17 |
| 11557-11687 | 20 |
| 11689-11813 | 21 |
| 11815-11957 | 22 |
| 11959-12271 | 23 |
| 12273-12670 | 24 |
| 12671-12841 | 27 |
| 12843-13050 | 28 |
| 13051-13364 | 29 |
| 13365-13489 | 30 |
| 13491-13863 | 31 |
| 13865-13998 | Apr. 3 |
| 13999-14301 | 4 |
| 14303-14430 | 5 |
| 14431-14636 | 6 |
| 14637-14955 | 7 |
| 14957-15123 | 10 |
| 15125-15318 | 11 |
| 15319-15406 | 12 |
| 15407-15602 | 13 |
| 15603-16145 | 14 |
| 16147-16304 | 17 |
| 16305-16440 | 18 |
| 16441-16688 | 19 |
| 16689-16963 | 20 |
| 16965-17336 | 21 |
| 17337-17455 | 24 |
| 17457-17787 | 25 |
| 17789-17933 | 26 |
| 17935-18156 | 27 |
| 18157-18531 | 28 |
| 18533-18638 | May 1 |
| 18639-18985 | 2 |
| 18987-19191 | 3 |
| 19193-19336 | 4 |
| 19337-19641 | 5 |
| 19643-19806 | 8 |
| 19807-19997 | 9 |
| 19999-20214 | 10 |
| 20215-20471 | 11 |
| 20473-20778 | 12 |
| 20779-20945 | 15 |
| 20947-21312 | 16 |
| 21313-21423 | 17 |
| 21425-21634 | 18 |
| 21635-21864 | 19 |
| 21865-21998 | 22 |
| 21999-22168 | 23 |
| 22169-22327 | 24 |
| 22329-22666 | 25 |
| 22667-22924 | 26 |
| 22925-23552 | 30 |
| 23552-23700 | 31 |
| 23701-23982 | June 1 |
| 23983-24261 | 2 |
| 24263-24514 | 5 |
| 24515-24658 | 6 |
| 24659-24818 | 7 |
| 24819-25073 | 8 |
| 25075-25330 | 9 |
| 25331-25411 | 12 |
| 25413-25665 | 13 |
| 25667-25787 | 14 |
| 25789-25981 | 15 |
| 25983-26276 | 16 |
| 26277-26410 | 19 |
| 26411-26559 | 20 |
| 26561-26688 | 21 |
| 26689-27154 | 22 |
| 27155-27506 | 23 |
| 27507-27773 | 26 |
| 27775-27979 | 27 |
| 27981-28168 | 28 |
| 28169-28427 | 29 |
| 28429-28804 | 30 |
| 28805-28963 | July 3 |
| 28965-29100 | 5 |
| 29101-29257 | 6 |
| 29259-29524 | 7 |
| 29525-29761 | 10 |
| 29763-29930 | 11 |
| 29931-30031 | 12 |
| 30033-30257 | 13 |
| 30259-30529 | 14 |
| 30531-30785 | 17 |
| 30787-30999 | 18 |
| 31001-31115 | 19 |
| 31117-31305 | 20 |
| 31307-31879 | 21 |
| 31881-32113 | 24 |
| 32115-32289 | 25 |
| 32291-32393 | 26 |
| 32395-32733 | 27 |
| 32735-33227 | 28 |
| 33229-33674 | 31 |
| 33675-33897 | Aug. 1 |
| 33899-34102 | 2 |
| 34103-34426 | 3 |
| 34427-34751 | 4 |
| 34753-35016 | 7 |
| 35017-35258 | 8 |
| 35259-35459 | 9 |
| 35461-35643 | 10 |
| 35645-35906 | 11 |
| 35907-36036 | 14 |
| 36037-36234 | 15 |
| 36235-36422 | 16 |
| 36423-36590 | 17 |
| 36591-36881 | 18 |
| 36883-37158 | 21 |
| 37159-37415 | 22 |
| 37417-37678 | 23 |
| 37679-37977 | 24 |
| 37979-38367 | 25 |
| 38369-38565 | 28 |
| 38567-38675 | 29 |
| 38677-38795 | 30 |
| 38797-39067 | 31 |
| 39069-39317 | Sept. 1 |
| 39319-39560 | 5 |
| 39561-39738 | 6 |
| 39739-39950 | 7 |
| 39951-40195 | 8 |
| 40197-40448 | 11 |
| 40449-40799 | 12 |
| 40801-41011 | 13 |
| 41013-41179 | 14 |
| 41181-41369 | 15 |
| 41371-41940 | 18 |
| 41941-42232 | 19 |
| 42233-42724 | 20 |
| 42725-43009 | 21 |
| 43011-43281 | 22 |
| 43283-43427 | 25 |
| 43429-43701 | 26 |
| 43703-44464 | 27 |
| 44465-44812 | 28 |
| 44813-45336 | 29 |
| 45337-45545 | Oct. 2 |
| 45547-45819 | 3 |
| 45821-45975 | 4 |
| 45977-46285 | 5 |
| 46287-46499 | 6 |
| 46501-46820 | 10 |
| 46821-46951 | 11 |
| 46953-47162 | 12 |
| 47163-47484 | 13 |
| 47485-47706 | 16 |
| 47707-47968 | 17 |
| 47969-48617 | 18 |
| 48619-48987 | 19 |
| 48989-49283 | 20 |
| 49285-49517 | 23 |
| 49519-49772 | 24 |
| 49773-49969 | 25 |
| 49971-50156 | 26 |
| 50157-50407 | 27 |
| 50409-50669 | 30 |
| 50671-50843 | 31 |
| 50845-50994 | Nov. 1 |
| 50995-51372 | 2 |
| 51373-51594 | 3 |
| 51595-51751 | 6 |
| 51753-52017 | 7 |
| 52019-52196 | 8 |
| 52197-52454 | 9 |
| 52455-52692 | 13 |
| 52693-53025 | 14 |
| 53027-53410 | 15 |
| 53411-53699 | 16 |
| 53701-54079 | 17 |
| 54081-54189 | 20 |
| 54191-54616 | 21 |

## FEDERAL REGISTER PAGES AND DATES—1978

| Pages | Date | Pages | Date | Pages | Date |
|---|---|---|---|---|---|
| 54617-54918 | 22 | 57139-57237 | 6 | 59049-59334 | 19 |
| 54919-55232 | 24 | 57239-57487 | 7 | 59335-59464 | 20 |
| 55233-55331 | 27 | 57489-57859 | 8 | 59465-59822 | 21 |
| 55333-55739 | 28 | 57861-58076 | 11 | 59823-60135 | 22 |
| 55741-56007 | 29 | 58077-58174 | 12 | 60137-60258 | 26 |
| 56009-56201 | 30 | 58175-58351 | 13 | 60259-60425 | 27 |
| 56203-56636 | Dec. 1 | 58353-58534 | 14 | 60427-60856 | 28 |
| 56637-56868 | 4 | 58535-58800 | 15 | 60857-61261 | 29 |
| 56869-57137 | 5 | 58801-59047 | 18 | | |

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